(22,817)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1912.

No. 395.

GILA VALLEY, GLOBE & NORTHERN RAILWAY COMPANY, M. P. FREEMAN, AND M. P. FREEMAN AND FRANK H. HEREFORD, EXECUTORS OF H. B. TENNEY, DECEASED, PLAINTIFFS IN ERROR,

vs.

JOHN HALL.

IN ERROR TO THE SUPREME COURT OF THE TERRITORY OF ARIZONA.

INDEX.

	Original	Print
Caption	a	1
Transcript from district court of Gila county	1	1
Amended complaint	1	1
Answer to amended complaint	5	3
Reply to defendant's amended answer	8	4
Verdict	9	5
Remittur	9	6
Judgment	12	6
Motion for new trial	14	7
Minute entries of the trial	17	8
Order fixing time for defendant to answer	17	9
Order denying motion to make amended complaint more certain, &c.	18	9
Order to enter associate counsel	18	9
Order for trial	10	10
Order granting leave to amend complaint	19	10

Judd & Detweiler (Inc.), Printers, Washington, D. C., May 21, 1913.

	Original.	Print
Order beginning trial	20	10
Order resuming trial	22	11
Order resuming trial	23	12
Order resuming trial	24	13
Order resuming trial	25	13
Order allowing jury to separate	26	14
Order granting motion to allow jury to have written instructions	27	14
Order to poll jury	28	14
Verdict	29	15
Order to read verdict	29	16
Order discharging jury	29	16
Order deferring rendition of judgment	30	16
Order fixing time to hear motion for new trial	30	17
Order deferring hearing on motion for new trial	31	17
Order continuing motion for the term	31	17
Order denying motion for new trial	32	18
Supersedeas bond	33	18
Memoranda as to parts omitted from record	35	19
Clerk's certificate	36	20
Statement of facts	37	20
Testimony of John Hall	37	20
James C. Ryan	51	26
J. E. Printy	58	29
L. S. Medler	64	31
W. P. Greer	72	34
J. E. Printy (recalled)	77	36
L. S. Medler (recalled)	79	38
Dr. L. E. Wightman	80	38
Dr. E. R. McPheeters	82	39
H. H. Bro	83	39
John Hall (recalled)	84	40
Plaintiff rests	87	41
Motion for verdict for defendant	87	41
Testimony of James C. Ryan	88	41
F. N. Dodge	104	48
J. H. Callen	125	56
C. C. Mallard	130	58
Instructions given by the court to jury	132	59
Plaintiff's Exhibit "A"—Sketch of track	143	62
Plaintiff's Exhibits B and 1—(Not set out)	144	64
Judge's certificate to statement of facts	144	64
Instructions requested by defendant and refused by the court	145	64
Order submitting cause on briefs	150	67
Order setting cause for hearing	150	67
Order submitting cause after argument	151	67
Order granting reargument	151	67
Order granting leave to file additional brief	151	67
Motion for setting of reargument	152	68
Order continuing argument	152	68
Order submitting cause	153	68
Opinion	154	68
Concurring opinion	165	73

	Original	Print
Judgment	165	73
Motion for rehearing	166	74
Order submitting motion for rehearing	168	74
Order denying motion for rehearing	168	75
Order granting leave to withdraw motion to substitute parties	169	75
Order staying mandate	169	75
Petition for writ of error	170	75
Bond on writ of error	175	78
Assignments of error	180	82
Clerk's certificate to transcript	190	85
Writ of error	191	86
Citation and service	194	87
Order extending time to docket	196	88

a In the Supreme Court of the Territory of Arizona.

No. 1110.

GILA VALLEY, GLOBE AND NORTHERN RAILWAY COMPANY, a Corporation, Appellant,
vs.
JOHN HALL, Appellee.

Eugene S. Ives, Esq., and S. L. Pattee, Esq., attorneys for appellant.

A. C. Baker, Esq., and Geo. J. Stoneman, Esq., and F. C. Jacobs, Esq., (of the law firm of Stoneman & Jacobs), attorneys for Appellee.

On Appeal from the District Court of the Fifth Judicial District of the Territory of Arizona in and for the County of Gila.

Be it remembered that on to-wit: the twelfth day of March, 1909, came the appellant, in the above entitled cause, by its Attorneys, and filed in the Clerk's office of said Court, in said entitled cause, a certain Judgment Roll and Statement of Facts, in words and figures following to-wit:

Here follows the Original Complaint, Motion to Make Complaint more definite and certain and the Order to show why said Complaint should not be made more definite and certain which are omitted from the Transcript by direction of the Attorneys for Plaintiff in Error.

1 In the District Court of the Fifth Judicial District of the Territory of Arizona in and for the County of Gila.

JOHN HALL, Plaintiff,
vs.
GILA VALLEY, GLOBE AND NORTHERN RAILWAY COMPANY, a Corporation, Defendant.

Amended Complaint.

For an amended complaint, the said plaintiff, John Hall, complains of Gila Valley, Globe and Northern Railway Company, a corporation, defendant herein, for that the said defendant being a railway corporation organized and existing under the laws of Arizona Territory, before and at the time of the committing of the grievances hereinafter mentioned, and then was a common carrier engaged in trade and commerce and the owner of and operating a
2 certain railroad, running from Globe, in said Territory to Bowie therein, and was the owner of a certain railroad gaso-

line velocipede, used on the track of said railroad in conveying men engaged in locating places for mile posts along the line of the track of said railroad.

That the said Plaintiff, on the 23rd day of April, 1907, at Gila County, in said Territory, at the time of the committing of the said grievances was in the employment of said defendant as a chainman in the engineering force of the said defendant, engaged in locating places for mile posts along the line of the track of said railroad, and it then and there became and was the duty of the said defendant to procure and have a good, safe and secure railroad gasoline velocipede to move, propel and carry this plaintiff from place to place on the line of the track of said railroad in the performance of his duty in and about said employment, and to move, propel and carry the tools and material used by the said plaintiff in locating places for mile posts along the line of the track of said railroad, yet the said defendant, not regarding its duty in that behalf, conducted itself so carelessly, negligently and unskillfully that by and through the carelessness, negligence and default of the said defendant in
3 providing, using and suffering to be used an unsafe, defective and insecure railroad gasoline velocipede for the purposes aforesaid, and for the want of due care and attention to its duty on that behalf, on the said 23rd day of April, 1907, and whilst said railroad gasoline velocipede was in the use and service of said defendant upon said railroad, and whilst the said plaintiff was upon the same, acting in the capacity and employment aforesaid for the said defendant, the said railroad gasoline velocipede by reason of the unsafeness, defectiveness and insecurity thereof, ran off the said track of said railroad upon a curve thereof, whereby this plaintiff was thrown violently therefrom to the ground while said velocipede was in motion, greatly injuring him and wounding him, breaking one of his legs in three places, as well as bruising and injuring him upon the back, shoulder and in divers places upon his body, and in consequence thereof, this plaintiff became sick and permanently disabled, and has so remained ever since that day, and during all of that time this plaintiff was unable, and still is unable to perform any work or labor of any kind, and has been ever since and still is prevented from attending to his ordinary business, and has been and now is thereby permanently deprived of the use
4 of his leg, to his great damage, to-wit: to the damage of said plaintiff in the sum of Ten Thousand Dollars ($10,000).

That the said railroad gasoline velocipede was unsafe, insecure and defective in this, to-wit: It was an old velocipede and out of repair, and the inside of the flange or rim of one of its wheels was worn down and hollowed out, and the face of said wheel was worn through and cracked and broken, all from the long and constant usage of said velocipede, by reason whereof said railroad gasoline velocipede ran off the track of said railroad, upon a curve thereof as aforesaid, whereby the plaintiff was injured as hereinbefore stated.

That the defendant knew, or by the exercise of ordinary care

and attention to its business, might have known, of the unsafe, defective and insecure condition of said railroad gasoline velocipede, and that the plaintiff did not know of its unsafe, defective and insecure condition, and was without fault in producing his said injuries.

Wherefore, plaintiff prays judgment against the said defendant for the sum of Ten Thousand Dollars ($10,000), his damage so sustained as aforesaid, and the costs of this suit.

THOS. E. FLANIGAN,
A. C. BAKER,
Attorneys for Plaintiff.

(Filed Nov. 20th, 1907.)

(Title of Cause.)

Answer.

Now comes the above named defendant, and for its answer to the amended complaint of the plaintiff herein:

I.

Admits that it is and was during the times mentioned in said amended complaint a corporation organized under the laws of the Territory of Arizona, and that it owns and operates and has owned and operated at all the times in said amended complaint mentioned a line of railway running from Bowie in the County of Cochise, Territory of Arizona, to Globe, in the County of Gila in said Territory.

II.

It admits that for a time prior to the 24th day of April, 1907, the plaintiff was in the employ of the defendant, and that on or about the last mentioned date the plaintiff received some injuries to his person, while so in defendant's employ.

III.

It denies each and every allegation, matter and thing in said amended complaint set forth, except as hereinbefore admitted.

Wherefore, defendant prays judgment that plaintiff take nothing by this action, and for its costs herein.

EUGENE S. IVES,
WILEY E. JONES,
Attorneys for Defendant.

And further answering the said amended complaint, the defendant avers that the injuries alleged to have been received by the plaintiff were caused by the carelessness and negligence of the

plaintiff, and that plaintiff by his own carelessness and negligence contributed to such injuries.

Wherefore, defendant prays judgment that plaintiff take nothing by this action, and for its costs.

EUGENE S. IVES,
WILEY E. JONES,
Attorneys for Defendant.

7 And further answering the said amended complaint, defendant alleges that for some time prior to the time the plaintiff received the injuries set forth in said amended complaint, he was in the employ of the defendant and in the performance of the duties of his employment used and operated the velocipede mentioned in said amended complaint, and that during all such time the plaintiff had opportunity to know and well knew the condition of said velocipede and any defects or insufficiencies therein, but notwithstanding such knowledge plaintiff so used said velocipede without objection and without making any complaint to the defendant, and thereby plaintiff assumed the risk of injury by reason of the condition of said velocipede.

Wherefore, defendant prays judgment that plaintiff take nothing by this action, and for its costs.

EUGENE S. IVES,
WILEY E. JONES,
Attorneys for Defendant.

(Filed Nov. 26th, 1907.)

8 Title of Cause.

Reply.

Now comes the plaintiff and in reply to new matter set up in defendant's answer:

I.

Denies that the injuries received by plaintiff and set out in his amended complaint herein were caused by the carelessness or negligence of the plaintiff, and denies that the plaintiff by his own carelessness or negligence contributed to such injuries.

II.

The plaintiff admits that for some time prior to the time he received the injuries set forth in the amended complaint herein he was in the employ of the defendant, but he denies that in the performance of the duties of his employment he operated the velocipede mentioned in said amended complaint or that he used it in any other way or manner than that stated in the amended complaint herein, and denies that the plaintiff, at the time he received the injuries set forth in said amended complaint, or at any time

prior thereto, knew or had any knowledge of any defect or
9 insufficiencies in said velocipede, or had any opportunity to know; and denies that plaintiff assumed the risk of the injuries received by him and set forth in said amended complaint.

A. C. BAKER,
STONEMAN & JACOBS,
Attorneys for Plaintiff.

(Filed December 4th, 1907.)

Title of Cause.

Verdict.

We the jury duly impanelled and sworn in the above entitled action, upon our oaths do find for the plaintiff in the sum of $10,000.00 (Ten Thousand Dollars).

HARRY TEMPLE, *Foreman.*

(Filed December 9th, 1907.)

Title of Cause.

Be it remembered: That, Whereas the above entitled cause wherein John Hall is plaintiff and the Gila Valley, Globe and Northern Railway Company, a corporation, is defendant, having come on regularly for trial in the District Court of the Fifth
10 Judicial District of the Territory of Arizona in and for the County of Gila on the sixth day of December, 1907, and a jury in said case having been duly impanelled and sworn to try the issue, and plaintiff being present in court in person and by his attorneys, Mr. A. C. Baker and Messrs. Stoneman & Jacobs, and defendant being present in court by its counsel, Mr. Eugene S. Ives and Mr. Wiley Jones, and oral and documentary evidence having been submitted by plaintiff in support of the allegations of his complaint, and evidence having been submitted by the defendant to sustain the allegations of its answer and this cause having been submitted to the jury for its determination, and the jury, on the ninth day of December, 1907, having returned into open court its verdict in favor of the plaintiff and against the defendant, awarding to plaintiff, John Hall, damages in the sum of ten thousand dollars against the defendant, Gila Valley, Globe and Northern Railway Company, together with costs amounting to the sum of $230.20, and plaintiff, John Hall, being now desirous of remitting a portion of such verdict.

Now wherefore, for the purposes of carrying into effect the desire of plaintiff as above mentioned, in accordance with the provisions of Section- 1450 and 1451, Revised Statutes of Arizona,
11 plaintiff, John Hall, by his attorneys, A. C. Baker and Stoneman & Jacobs, herewith voluntarily remits from said verdict of $10,000, together with $230.20 costs of suit, so rendered as above mentioned and set forth the sum of five thousand dollars ($5,000),

and requests that judgment be entered upon said verdict against the Gila Valley, Globe and Northern Railway Company, a corporation, for the sum of $5,000. together with the sum of $230.20, costs of suit, hereby expressly waiving any claim or right to a judgment in excess of the sum of five thousand dollars and costs of suit.

In witness whereof, we have hereunto set our hands this first day of October, 1908.

STONEMAN & JACOBS,
A. C. BAKER,
Attorneys for John Hall, Plaintiff.

TERRITORY OF ARIZONA,
County of Gila:

On this day, before me, George H. Smalley, Clerk of District Court of the Fifth Judicial District of the Territory of Arizona in and for the County of Gila, personally appeared George J.
12 Stoneman, one of the attorneys for John Hall, plaintiff above named, and acknowledged to me that he executed the above Remitter of Judgment for and on behalf of John Hall, plaintiff, above named, and as the act of A. C. Baker and the firm of Stoneman & Jacobs, attorneys for said plaintiff, John Hall, for the purposes in said Remitter mentioned and set forth.

Given under my hand and official seal, this first day of October, 1908.

[SEAL.] GEO. H. SMALLEY, *Clerk*,
By ELSIE PARKER, *Deputy*.

(Filed October 1st, 1908.)

Title of Cause.

Judgment.

Be it remembered, that the above entitled action, wherein John Hall is plaintiff and the Gila Valley, Globe and Northern Railway Company, a corporation, is defendant, having come on regularly for trial on the sixth day of December, 1907, before a jury duly impanelled and sworn to try the issue, plaintiff being present in court in person and by his counsel, Mr. A. C. Baker and
13 Messrs. Stoneman & Jacobs, and defendant being present in court by its counsel, Mr. Eugene S. Ives and Mr. Wiley E. Jones, and oral and documentary evidence having been submitted by plaintiff in support of the allegations of his complaint, and evidence having been submitted by the defendant to sustain the allegations of its answer, and the submission of evidence having been concluded on behalf of both plaintiff and defendant, arguments having been presented to the jury by counsel for both plaintiff and defendant, and the jury having been instructed by the Court, and this cause having been submitted to the jury for its determination, and the jury, on the 9th day of December, 1907, having returned into open court its verdict in favor of the plaintiff and against the

defendant, awarding to plaintiff, John Hall, damages in the sum of Ten Thousand Dollars against the defendant, Gila Valley, Globe and Northern Railway Company, a corporation, and the plaintiff having remitted the sum of Five Thousand Dollars from said verdict by filing with the Clerk of said Court his voluntary Remitter in writing of said amount, requesting that judgment be entered upon the verdict for the sum of Five Thousand ($5,000) Dollars, together with costs.

14 Now, therefore, it is ordered, adjudged and decreed that plaintiff, John Hall, do have and recover from the defendant, Gila Valley, Globe and Northern Railway Company, a corporation, the sum of Five Thousand Dollars, together with costs incurred by plaintiff amounting to the sum of $230.20; and that execution issue therefor.

Done in open court this 20th day of October, 1908.

FREDERICK S. NAVE.
Judge of the District Court of the Fifth Judicial District of the Territory of Arizona in and for the County of Gila.

(Filed November 9th, 1908.)

Title of Cause.

Motion for New Trial.

Comes now the defendant herein, Gila Valley, Globe and Northern Railway Company, a corporation, and moves the Court to set aside the verdict of the jury and grant a new trial of this cause, upon the following grounds, to-wit:

I.

15 That the court erred in admitting evidence over the objection of the defendant, to which the defendant excepted.

II.

That the Court erred in rejecting evidence offered on behalf of the defendant, to which rulings the defendant excepted.

III.

That the Court erred in charging the jury.

IV.

That the Court erred in refusing instructions requested by the defendant.

V.

That the Court erred in refusing to direct the jury to find a verdict for the defendant.

VI.

That the evidence does not sustain the verdict.

VII.

That the verdict is contrary to law.

VIII.

That the verdict is contrary to the instructions of the Court.

16 IX.

That the verdict is contrary to the evidence.

X.

That the Court erred in instructions given at the request of the plaintiff.

XI.

That the amount of the verdict is excessive.

Wherefore, defendant asks the verdict herein be set aside and a new trial of the cause granted upon the foregoing grounds.

EUGENE S. IVES,
WILEY E. JONES,
Attorneys for Defendants.

(Filed December 18th, 1907.)

17 In the District Court of the Fifth Judicial District of the Territory of Arizona in and for the County of Gila.

JOHN HALL, Plaintiff,
vs.
GILA VALLEY, GLOBE AND NORTHERN RAILWAY COMPANY, a Corporation, Defendant.

Minute Entries on Appeal.

Be it remembered that heretofore and to-wit: on the 19th day of November, 1907, the same being one of the regular juridical days of the November, 1907, term of said Court, the following order was made and entered, inter alia, in said Court, in said cause, which said order is in figures and words as follows, to-wit:

Order Fixing Time for Defendant to Answer.

1242.

JOHN HALL
vs.
GILA VALLEY, GLOBE AND NORTHERN RY. CO.

Upon advise by counsel of intention of filing an amended complaint, it is ordered that the defendant have ten days in which to answer said amended complaint, by service of a copy therein.

Be it remembered that heretofore and to-wit: On the 20th day of November, 1907, the same being one of the regular juridical days of the November, 1907, term of said Court, the following order
18 was made and entered, inter alia, in said Court, in said cause, which said order is in figures and words as follows, to-wit:

Order Denying Motion; Order to Enter Demand for Jury.

1242.

JOHN HALL
vs.
GILA VALLEY, GLOBE & NORTHERN RY. CO.

Comes now the defendant and presents to the Court its motion to make the complaint herein definite and certain, which is argued by the respective counsel and thereupon it is ordered that the said motion as applied to the amended complaint herein is denied; to which the Defendant immediately excepts, whereupon it is further ordered that the defendant be required to answer the complaint within seven days from this day; whereupon the plaintiff herein demands a trial by jury herein, which is ordered entered.

Be it remembered that heretofore and to-wit: On the 25th day of November, 1907, the same being one of the regular juridical days of the November, 1907, term of said Court, the following order was made and entered, inter alia, in said Court in said cause, which said order is in figures and words, as follows, to-wit:

Order to Enter Associate Counsel.

1242.

JOHN HALL
vs.
GILA VALLEY, GLOBE AND NORTHERN RAILWAY CO.

It is ordered that Stoneman and Jacobs, Esqs., be entered as associate counsel for the plaintiff.

Be it remembered that heretofore and to-wit: on the 29th day of November, 1907, the same being one of the regular juridical days of the November, 1907, term of said Court, the following order was made and entered, inter alia, in said Court in said cause, which said order is in figures and words, as follows, to-wit:

Order for Trial.

1242.

JOHN HALL
vs.
GILA VALLEY, GLOBE AND NORTHERN RAILWAY CO.

It is by the Court ordered that this case be and the same is hereby set for trial on December 6, 1907.

Be it remembered that heretofore and to-wit: on the 5th day of December, 1907, the same being one of the regular juridical days of the November, 1907, term of said Court, the following order was made and entered, inter alia, in said Court, in said cause, which said order is in figures and words, as follows, to-wit:

Order Granting Leave to Amend.

1242

JOHN HALL
vs.
GILA VALLEY, GLOBE AND NORTHERN RAILWAY CO.

On motion of the plaintiff, with the consent of the defendant, it is ordered that the plaintiff be allowed to insert by interlineation in his amended complaint at the sixth line thereof after the word "was" "a common carrier engaged in trade as carrier and," which is done instanter in open Court.

Be it remembered that heretofore and to-wit: On the 6th day of December, 1907, the same being one of the regular juridical days of the November, 1907, term of said Court, the following order was made and entered, inter alia, in said Court, in said cause, which said order is in figures and words, as follows, to-wit:

Trial.

1242.

JOHN HALL
vs.
GILA VALLEY, GLOBE AND NORTHERN RAILWAY CO.

This cause came on regularly for trial, the plaintiff appearing in person and by counsel, A. C. Baker, Stoneman and Jacobs, Esqs.,

the name of Thos. E. Flannigan, Esq., upon motion being withdrawn as counsel for plaintiff, and the defendant present by counsel, Eugene S. Ives and Wiley E. Jones, Esqs. whereupon by consent of plaintiff the defendant is allowed to amend its answer at the seventh line and the further answer by inserting after the word "plaintiff" the words "had opportunity to know and," whereupon both parties announce ready for trial; whereupon the clerk is ordered to draw twenty names from the trial jury box wherein he had deposited in the presence of the Court the names of jurors summoned and not excused and thereupon the names of twenty jurors are drawn, all take their places in the trial jury box; whereupon the clerk
21 is ordered to swear said jurors on their voir dire, which is done; whereupon the clerk is ordered to poll said jury; whereupon the defendant challenged J. W. Harrington, which is not allowed and the panel being now full and complete and the jury in the jury box passed for cause by both plaintiff and defendant, the respective parties exercise their right to peremptory challenge, and the following named persons were drawn to constitute the jury herein, to-wit: Jos. W. Medlyn, N. J. Hale, Arthur Kenyon, Walter Nash, H. McCormack, Chas. F. Beck, Felix Lann, H. Temple, W. J. Crowe, M. E. Knowles, J. T. Farquhar, P. K. Mehew, who are duly sworn to well and truly try the issue joined between John Hall, plaintiff and the Gila Valley, Globe and Northern Railway Co. defendant, whereupon the plaintiff read his complaint, and thereupon the defendant read its answer, and thereupon plaintiff read his reply, and the answer of defendant; whereupon plaintiff stated his case to the jury, and thereupon to maintain upon his part the issue herein, plaintiff called John Hall, who is first duly sworn then examined and cross-examined; whereupon a certain plot is introduced by plaintiff, which is admitted and marked "Plaintiff's Exhibit "A"; and this being the usual hour for recess, the Court admonished the jury according to law and excused said jury until 2:00 P. M. of this day; whereupon the trial herein is ordered suspended until that hour.

22 Be it remembered that heretofore and to-wit: on the 6th day of December, 1907, the same being one of the regular juridical days of the November, 1907, term of said Court, the following order was made and entered, inter alia, in said Court in said cause, which said order is in figures and words, as follows, to-wit:

Trial Resumed.

1242.

JOHN HALL
vs.
GILA VALLEY, GLOBE AND NORTHERN RAILWAY CO.

The plaintiff being present in person and by counsel, and the defendant present by counsel, comes now the jury herein into Court, and the clerk is ordered to call said jury all answering thereto; whereupon the trial herein is ordered resumed; whereupon plaintiff

called James C. Ryan, J. A. Printy, L. A. Medler, W. P. Greer, who are first duly sworn then examined and cross-examined and this being the usual hour for recess, the court admonished the jury according to law, and excused said jury until Saturday, December 7, 1907, at 9:30 o'clock P. M.; whereupon the trial herein is ordered suspended until that hour.

Be it remembered that heretofore and to-wit: On the 7th day of December, 1907, the same being one of the regular juridical days of the November, 1907, term of said Court, the following order was made and entered, inter alia, in said Court, in said cause,
23 which said order is in figures and words, as follows, to-wit:

Trial Resumed.

1242.

JOHN HALL
vs.
GILA VALLEY, GLOBE AND NORTHERN RAILWAY CO.

The plaintiff being present in person and by counsel, and the defendant present by counsel, comes now the jury herein into Court, and the clerk is ordered to call said jury, all answering thereto, whereupon the trial herein is ordered resumed, whereupon plaintiff recalled J. A. Printy, L. A. Medler, who are examined and cross-examined; whereupon plaintiff called Dr. L. E. Wightman, Dr. C. R. McPheeters, H. H. Bru, who are first duly sworn then examined and cross-examined, whereupon John Hall is recalled by plaintiff then examined and cross-examined; whereupon the Court admonished the jury and excused said jury during argument of motion, and subsequently said jury returns into court and the Clerk is ordered to call said jury all answering thereto, whereupon the trial herein is ordered resumed, and John Hall continues his testimony; whereupon plaintiff introduced a certain piece of bone, which is admitted and marked "Plaintiff's Exhibit B"; whereupon defendant presented a certain wheel, which is admitted and marked "Defendant's Exhibit 1"; whereupon plaintiff rests. Whereupon defendant moves that the jury be instructed to return a verdict in favor of the defendant, and thereupon the Court admonished the jury and excused said jury during argument, and subsequently the jury
24 is ordered into Court and their names being called all answered thereto; whereupon it is ordered that the motion of the defendant be denied; whereupon the defendant is ordered to proceed and thereupon called James C. Ryan, who is examined and cross-examined; and this being the usual hour for recess, the Court admonished the jury according to law and excused said jury until 2:30 o'clock P. M. of this day; whereupon the trial herein is ordered suspended until that hour.

Be it remembered that heretofore and to-wit: on the 7th day of December, 1907, the same being one of the regular juridical days of

the November, 1907, term of said Court, the following order was made and entered, inter alia, in said Court, in said cause, which said order is in figures and words, as follows, to-wit:

Trial Resumed.

1242.

JOHN HALL
vs.
GILA VALLEY, GLOBE AND NORTHERN RY. CO.

Plaintiff being present in person and by counsel, and the defendant present by counsel, comes now the jury herein, and the Clerk is ordered to call said jury, all answering thereto; whereupon the trial herein is ordered resumed; whereupon the defendant recalled James Ryan, who is examined and cross-examined; whereupon the defendant called F. M. Dodge, J. H. Callon, C. C. Mallard,
25 who are first duly sworn then examined and cross-examined, and thereupon the defendant rests, and the plaintiff rests, whereupon the defendant renewed its motion that the Court direct a verdict in favor of the defendant, and thereupon the jury herein is admonished by the Court, and excused from the Courtroom during argument of counsel; and subsequently said jury is ordered brought into Court, and their names being called, all answered thereto, whereupon the Court reserved its ruling on said motion; and this being the usual hour of recess, the jury is admonished by the Court and excused until Monday, December 9, 1907, at 9:30 o'clock A. M., and thereupon the trial herein is suspended until that hour.

Be it remembered that heretofore and to-wit: On the 9th day of December, 1907, the same being one of the regular juridical days of the November, 1907, term of said Court, the following order was made and entered, inter alia, in said Court, in said cause, which said order is in figures and words, as follows, to-wit:

Trial Resumed.

1242.

JOHN HALL
vs.
GILA VALLEY, GLOBE AND NORTHERN RAILWAY CO.

The plaintiff being present in person and by counsel, and the defendant present by counsel, comes now the jury herein into Court, and their names being called by the Clerk, all answered thereto; whereupon the trial herein is ordered resumed; whereupon
26 the Court announced that Forty-five minutes is allowed each side to present the case in argument to the jury, and there-

upon argument by the respective counsel followed; whereupon the Court instructed the jury orally, the charge being taken down in short-hand by E. B. Van Veen, official reporter in attendance upon the trial, and the case being now fully submitted to the jury, the clerk is ordered to swear a bailiff and thereupon Fred Roberts is sworn and said jury retires in his charge to consider of their verdict.

Be it remembered that heretofore and to-wit: On the 9th day of December, 1907, the same being one of the regular juridical days of the November, 1907, term of said Court, the following order was made and entered, inter alia, in said Court, in said cause, which said order is in figures and words, as follows, to-wit:

Order Allowing Jury to Separate.

1242.

GILA VALLEY, GLOBE AND NORTHERN RAILWAY CO.

Comes now the Jury herein into Court, in charge of their bailiff sworn for that purpose, and the clerk is ordered to call said jury all answering thereto, whereupon the Court admonished said jury, and then allowed said jury to separate and said jury is then excused until 1:30 o'clock P. M. of this day.

Be it remembered that heretofore and to-wit: On the 9th
27 day of December, 1907, the same being one of the regular juridical days of the November, 1907, term of said Court, the following order was made and entered, inter alia, in said Court, in said cause, which said order is in figures and words, as follows, to-wit:

Order Granting Motion of Defendant.

1242.

JOHN HALL
vs.
GILA VALLEY, GLOBE AND NORTHERN RAILWAY CO.

The plaintiff being present in person and by counsel, and the defendant by counsel, the defendant now moves the Court to grant the request of said jury that the jury be allowed to have the written instructions of the Court in the Jury room, and the plaintiff consenting, it is ordered that the trial jury herein be brought into Court, which is done, and the names of said jurors being called all answered thereto; whereupon the jury asks that they be furnished with the Court's instructions, and said motion of the defendant is now granted

and the instructions as typewritten are given to the jury, and thereupon said jury retires in charge of their bailiff, to consider of their verdict.

Be it remembered that heretofore and to-wit: On the 9th day of December, 1907, the same being one of the regular juridical days of the November, 1907, term of said Court, the following order was made and entered, inter alia, in said Court in said cause,
28 which said order is in figures and words, as follows, to-wit:

Order to Poll Jury.

1242.

JOHN HALL
vs.
GILA VALLEY, GLOBE AND NORTHERN RAILWAY CO.

The plaintiff and defendant being present in open Court by counsel, comes now the jury herein into Court in charge of their bailiff, sworn for that purpose, and the clerk is ordered to call said jury, all answering thereto, whereupon said jury is asked by the Court if they have agreed upon a verdict and said jury replied that they have, and thereupon they returned their verdict to the Court, signed by the foreman thereof, and the Court announced the verdict, as for the plaintiff, and inquired if either side desired the jury polled, and thereupon the defendant requested that the jury be polled, and the clerk is ordered to poll said jury, which is done by calling each juror's name and asking him if this is his verdict to which each juror replied that it is; whereupon the plaintiff is ordered to deposit with the clerk the per diem of the jury herein for Friday, Saturday, Sunday and Monday, being four days at $36.00 per day, a total of One Hundred and Forty-four Dollars, which is done, whereupon the Court ordered the verdict spread in full upon the minutes, which is done as follows, to-wit:

29 *Verdict as Received.*

JOHN HALL
vs.
GILA VALLEY, GLOBE AND NORTHERN RY. CO.

We, the jury duly empaneled and sworn in the above entitled action upon our oaths do find, for the plaintiff in the sum of Ten Thousand Dollars.

HARRY TEMPLE, *Foreman.*

Order to Read Verdict.

By order of the Court, the clerk then read said verdict to the jury and inquired of them whether it is their verdict, and said jury replied that it is and so say they all, which is ordered entered.

Be it remembered that heretofore and to-wit: On the 9th day of December, 1907, the same being one of the regular juridical days of the November, 1907, term of said Court, the following order was made and entered, inter alia, in said Court, in said cause, which said order is in figures and words, as follows, to-wit:

Order Discharging Jury.

1242.

JOHN HALL
vs.
GILA VALLEY, GLOBE AND NORTHERN RAILWAY CO.

It is ordered that the jury herein be discharged from this case and they are excused until Tuesday, December, 10, 1907, at 9:30 o'clock A. M.

Be it remembered that heretofore and to-wit: On the 14th day of December, 1907, the same being one of the regular juridical days of the November, 1907, term of said Court, the following order was made and entered, inter alia, in said Court, in said cause, which order is in figures and words, as follows, to-wit:

Order Deferring Rendition of Judgment.

1242.

JOHN HALL
vs.
GILA VALLEY, GLOBE AND NORTHERN RAILWAY CO.

Plaintiff appearing by counsel, Stoneman and Jacobs, Esqs. and the defendant appearing by counsel, J. M. McCollum, Esq., plaintiff moves the Court for judgment on the verdict rendered herein, whereupon it is ordered that the rendition of judgment be deferred until the ruling shall have been made on the motion of the defendant for a new trial herein, to which the plaintiff excepts.

Be it remembered that heretofore and to-wit: On the 7th day of March, 1908, the same being one of the regular juridical days of the November, 1907, term of said Court, the following order was made and entered, inter alia, in said Court in said cause, which said order is in figures and words as follows, to-wit:

Order Fixing Time to Hear Motion for New Trial.

1242.

JOHN HALL
vs.
GILA VALLEY, GLOBE & NORTHERN RY. CO.

It is by the Court ordered that the motion for a new trial, filed herein, be and the same is hereby set for hearing on March
31 21, 1908, and the Clerk is directed to notify Senator E. S. Ives of this order.

Be it remembered that heretofore and to-wit: On the 21st day of March, 1908, the same being one of the regular juridical days of the November, 1907, term of said Court, the following order was made and entered, inter alia, in said Court, in said cause, which said order is in figures and words, as follows, to-wit:

Order Deferring Hearing on Motion for New Trial.

1242.

JOHN HALL
vs.
GILA VALLEY, GLOBE AND NORTHERN RY. CO.

It is ordered that the hearing upon defendant's motion for a new trial herein be and the same is hereby postponed until April 1, 1908.

Be it remembered that heretofore and to-wit: On the 21st day of April, 1908, the same being one of the regular juridical days of the November, 1907, term of said Court, the following order was made and entered, inter alia, in said Court, in said cause, which said order is in figures and words, as follows, to-wit:

Order Continuing Motion for Term.

1242.

JOHN HALL
vs.
GILA VALLEY, GLOBE & NORTHERN RY. CO.

It is by the Court ordered that the hearing on defendant's motion in arrest of judgment and new trial be continued for the term.

32 Be it remembered that heretofore and to-wit: On the 26th day of October, 1908, the same being one of the regular juridical days of the May, 1908, term of said Court, the following order was made and entered, inter alia, in said Court, in said cause, which said order is in figures and words as follows, to-wit:

Order Denying Motion for New Trial.

1242.

JOHN HALL
vs.
GILA VALLEY, GLOBE AND NORTHERN RY. CO.

The motion for a new trial herein having been submitted to the Court on a previous day, and the Court being fully advised in the premises now orders that the motion for a new trial in arrest of judgment be denied, and pursuant to the verdict of the Court and remitter on file the judgment of the Court is that the plaintiff recover from the defendant $5,000 and his costs. Whereupon the defendant gives notice of appeal to the Supreme Court of the Territory of Arizona from the judgment and the order of the Court denying its motion for a new trial herein, which is ordered entered.

33 In the District Court of the Fifth Judicial District of the Territory of Arizona in and for the County of Gila.

JOHN HALL, Plaintiff,
vs.
GILA VALLEY, GLOBE AND NORTHERN RAILWAY COMPANY, a Corporation, Defendant.

Supersedeas Bond.

Know all men by these presents, That we, Gila Valley, Globe and Northern Railway Company, a corporation, as principal, and M. P. Freeman and H. B. Tenney of the city of Tucson, Arizona, as sureties, are held and firmly bound unto John Hall, in the sum of Twelve Thousand Dollars, said sum being at least double the amount of the judgment hereinafter mentioned, and costs, to be paid unto the said John Hall, his executors or assigns, for which payment well and truly to be made we bind ourselves, our heirs, executors, administrators, and assigns, jointly and severally, firmly by these presents.

The said Gila Valley, Globe and Northern Railway Company as principal being bound in the full sum of Twelve Thousand Dollars, and the above named sureties being each bound in the said sum.

Sealed with our seals and dated this 14 day of November, 1908.

34 Whereas, On or about the 26th day of October, 1908 judgment was rendered in the above entitled action, whereby it was adjudged that the said John Hall, should recover from the said Gila Valley, Globe and Northern Railway Company, a corporation, the sum of Five Thousand Dollars with costs taxed at the sum of Two Hundred and thirty and 20/100 Dollars; and

Whereas, the said defendant has appealed to the Supreme Court of this Territory from the said judgment, and from the order of said court denying the motion of defendant for a new trial of the said cause, and

Whereas, the said Gila Valley, Globe and Northern Railway Company desires to suspend the execution of the said judgment,

Now, therefore, if the said Gila Valley, Globe and Northern Railway Company shall prosecute its said appeal with effect, and in case the judgment of the appellate court shall be against it, shall perform its judgment, sentence or decree, and pay all such damages as may be awarded against it upon the appeal, then this obligation shall be void, otherwise to remain in full force and effect.

GILA VALLEY, GLOBE AND NORTHERN RAILWAY COMPANY,
By EPES RANDOLPH, *President.*
CHAS. E. WALKER, *Secretary.*
H. B. TENNY,
M. P. FREEMAN, *Sureties.*

35 TERRITORY OF ARIZONA,
County of Pima, ss:

M. P. Freeman and H. B. Tenney, whose names are subscribed as sureties to the within Bond, being severally duly sworn, each for himself, deposes and says: that he is a resident and free holder within the Territory of Arizona, that he is worth the sum of Twelve Thousand Dollars, over and above all his just debts and liabilities, and over and above all property exempt from execution and forced sale.

H. B. TENNEY.
M. P. FREEMAN.

Subscribed and sworn to before me this 14 day of November, A. D. 1908.

My commission expires May 9, 1911.

JOSIE B. HENDERSON,
Notary Public.

Here follows copies of Jury lists; Memorandum of Costs and Disbursements; Stipulation fixing time within which to file Appeal Bond; and Notice of filing Statement of Facts; which are omitted by direction of attorney for appellant.

36 Here follows copies of the Instructions requested by Plaintiff and Defendant, which are omitted for the reason that they appear hereafter in the Statement of Facts.

Clerk's Certificate on Appeal of Cause to the Supreme Court of the Territory of Arizona.

TERRITORY OF ARIZONA,
County of Gila, ss:

District Court, Fifth Dist., Gila County, Arizona.

JOHN HALL, Plaintiff,
vs.
GILA VALLEY, GLOBE & NORTHERN RY. CO., Defendant.

I, George H. Smalley, Clerk of the District Court of the Fifth Judicial District of the Territory of Arizona, in and for the County of Gila, do hereby certify that the attached written and typewritten pages contain a true and correct copy of all the minute entries made in the above entitled case, and of the bond on appeal, and that the papers hereto attached are all of the papers constituting the record in said case, except the Reporter's Transcript; that Plaintiff's exhibits A and B are inclosed under separate cover, and forwarded herewith; that defendant's exhibit 1 (a large axle and wheel) are not forwarded owing to their great weight.

37 That these papers constitute the entire record in said case excepting precipes and subpœnas, which remain on file in the Clerk's office.

In witness whereof, I have hereunto set my hand and affixed the seal of said Court, at Globe, Arizona, this 9th day of March, A. D., 1909.

GEORGE H. SMALLEY,
[SEAL.] *Clerk of said Court.*

Title of Cause.

Statement of Facts.

This cause came on for trial on the sixth day of December, 1907, before the Court and a jury. The following is the evidence given at the trial of the cause.

JOHN HALL called as a witness in his own behalf, being duly sworn, testified as follows:

Direct examination.

By Mr. JACOBS:

My full name is John Hall. I reside at Phœnix in this Territory, I am the plaintiff in this action. My age is 35. My em-
38 ployment on and prior to the 23d of April of this year was chainman for the G. V. G. & N., the defendant in this action.

On the 23d of April of this year I was employed by the defendant as chainman. As such chainman my duties were chaining the distances, measurements, location of poles and other work we had to do along the road, chaining distances and making measurements for locating posts along the road for the G. V. G. & N. In discharging my duties I usually went down on the passenger train and then took a velocipede and worked north until the passenger train was due in the morning. I went down on the passenger train and started in on work at Solomonville on the 23d day of April of this year. I started my work at Calva. I came up there on the velocipede from Geronimo. The defendant was paying me for my services as chainman $65 per month. The velocipede I came up to Calva on on the 23d of April, was a three wheel, two cylinder gasoline car. Mr. Ryan accompanied me upon that occasion. He was operating the car and instrument and transit man. Operating the gasoline velocipede and handling the transit. Mr. Ryan at that time was employed by the defendant as transit man, instrument man and main-
39 tenance of way man. The railroad company furnished the velocipede upon which I was riding on that occasion. I did not on that occasion request the company to furnish me with that velocipede. I was sent out there to work following the instructions from Mr. Wright, assistant engineer in the employ of the G. V. G. & N. maintenance of way department. Prior to the 23d day of April of this year my health was first class. Very best of health; feeling fine. Prior to the time that I entered the employ of the defendant my employment was laborer, farm work. I had been a letter carrier at Phoenix. Also worked on a farm there. I was a letter carrier about three days short of ten years. I had been employed upon a farm or farms off and on ever since I have been in the Territory, since 1889. I worked at the sample room at Cananea. In the sample room at Cananea I was sampling shipments of ore. Picking down the samples. I mean by picking down the samples working them down to make the runs. That was pretty heavy work. I was on my feet while doing that work. I am not skilled in any branch of labor or profession. My wages while employed in the sample de-
40 partment as I have testified were three dollars a day and later three and a half. I was first employed as letter carrier in 1893. My wages as letter carrier were $600 the first year; $850 the second. On the 23d day of April this year at about the hour of noon or ten minutes after, we were coming north locating a mile post the other side of the semaphore, going north on the railroad track with the use of the velocipede, a three-wheel gasoline velocipde. About two miles north of San Carlos the velocipede jumped the track, throwing me in front of it. San Carlos is in Gila county, Arizona. This was upon the railroad track of the G. V., G. & N., the defendant. I was sitting upon that velocipede at the time it jumped the track as I have testified, on the front wheel. Mr. Ryan was on the wheel with me. I mean by riding on the front wheel, on the seat prepared for riding the front wheel over the front wheel. Mr. Ryan was at that time sitting at the rear

operating the machine. The seat in front unfolded for two passengers to ride and the one in the rear, it unfolded forward towards the wheels. I had with me upon that machine an axe, chain, tape line and a one and a half inch fence stave. I was holding them in my hands. I had nothing to do with the operation of this gasoline velocipede on that occasion. Not a thing to do with the
41 operating of the machine. I was not on that occasion familiar with the operation of a gasoline velocipede. I had had no experience whatever in the operation of such machines. I have never had any experience in the operation of any machine. I have never been employed by a railroad *by a railroad* company other than the defendant in this action. I drove a team for the Santa Fe at one time, mule team for the defendant. That was all. I had worked for the defendant in this action prior to the 23d of April of this year since March 9th, 1907, to April, 1907, as chainman. This gasoline velocipede was running at the time it left the track as I have testified, about eight or ten miles an hour. This car jumped the track, as we were coming off the curve on a tangent right hand curve. We were coming off a curve.

Q. Will you kindly take a sheet of paper and draw as near as you can that curve making the two rails and showing the curve and the direction in which the track turned. A. Witness draws chart.

That velocipede was running north at the time it left the track. (Witness marks paper.) About north here and south there (so marked). That cross line indicates the third wheel of the car.
42 The cross line that I have drawn upon the paper is the attachment from the two wheels from here to the third wheel running on the opposite side of the track. The accident occurred as we were leaving the curve and running upon a tangent, just before we left the curve. I understand as a tangent a piece of straight track. That's my understanding of it.

Chart drawn by witness offered in evidence. No objection by defendant. Received in evidence and marked Plaintiff's Exhibit A.

This velocipede left the track on the left hand side. This accident occurred about 12:15 noon. By the third wheel of a three wheel velocipede is meant the single wheel operating on the opposite track, the opposite rail from the two wheels. There are two wheels on the right hand side of the machine, one following behind the other and on the left side, that third wheel on the left side in reference to the front wheel on the right side is about opposite. When the car left the track it ran over me. At that time Mr. Ryan was sitting on the side of the car. The train came to pick me up about twenty minutes after the accident. At that time I was alongside of the track. Mr. Ryan was using the velocipede, taking it to overtake the work train to get me in. He went up the road and came back. He went after the work train on
43 this same velocipede. He put it back on the track. He never returned with the velocipede; he came back with the

work train, probably twenty minutes or half an hour after right alongside of the track that I lay until the caboose got me. Mr. Ryan accompanied me. At the time the velocipede left the track I was thrown outside the machine and it ran over me. I fell about about six feet in front of the machine. I was thrown in front of the machine across the right hand rail. We were coming north; this leg was across the rail and the car passed over it breaking it. On that side of the car there were two wheels. Two wheels on the right hand side of the car. Mr. Ryan clung to the car and he didn't get a fall. He went off on his feet; he was holding with his hands. Mr. Ryan was operating the car at that time. When the car left the track the single wheel climbed the rail and went off on the left hand side. By the single wheel I mean the wheel running on the left hand side of the track, the third wheel. After this accident they put me in the caboose and brought me to the hospital at Globe. I remained in the hospital at Globe from April 23d to October 10th; not sure of the latter date. I was there in the hospital for treatment. I was badly damaged and
44 broken; leg broken in three places, as a result of this car leaving the track, throwing me in front of it and running over me. I had a single fracture here (indicating on leg) and a single fracture here, and a double compound fracture here. The first point I indicate is on the leg, on the right leg about 10 inches above the knee. The second wound that I have mentioned is (shows calf of leg) below the knee, about six inches, and on the right hand side of the calf of the leg. The other injury I have is just above the ankle about two and a half inches, both bones broken there, compound fracture. (Witness takes off shoe and exhibits scars of injury to the right leg). The condition of that leg now as to its length in comparison with the other one is two inches short.

Its condition before the accident was same length as the left leg. When I say two inches short, I mean two inches shorter than prior to the accident.

Mr. Ivns: I admit that he was unable to use his leg during the time he was in the hospital because of the injury received in this accident.

45 Cross-examination.

By Mr. Ivns:

I was in the employ of this company, in the use of this gasoline engine fourteen hours about. Those fourteen hours covered a period of four days. The fourth day was the day of the accident. These four days the nature of my duties to this defendant corporation had been chainman. I had been chainman since the 9th of April. I drove the mule tram I think about a year. It was on the reconstruction. During that time when I was chainman I was working up and down the road, and during that time I never rode upon the gasoline engine until I was put working on it at that time during these four days. Before the 9th of April when I obtained employment *for* the company I was working at the grading camp I believe

here in the local yards. I was night watchman. I had been night watchman about two weeks I think. Prior to that I was working for Mr. Prena at Safford as farm hand. I obtained employment with this company from Mr. Fay. He was at that time assistant engineer of the Gila Valley road.

I just asked him for a position and he gave me one. That conversation was with Mr. Fay. He said he had a vacancy.
46 He told me the vacancy was chainman. I never met Mr. Fay before that. He said he would give me this position as chain man, and I started to work a few days after that with Mr. Ryan, Mr. Fay and myself. It was about the 8th or 9th of April when I first began to use this gasoline engine. When I was using this gasoline engine I was still working as chainman. Prior to the time I first used the gasoline engine I was told to go down to Solomonville and work up in the car. Mr. Wright, the assistant engineer of the Gila Valley, Globe and Northern told me that. I don't remember of any other conversation with Mr. Wright at that time or before that. He just told me to go down and work on the car with the boys. Prior to that I did not say anything to him about that employment on the gasoline engine. I had not known him before. I had no conversation with Mr. Wright or Mr. Fay with respect to my previous duties. The four days that I was working upon the gasoline engine when the engine stopped at different times, the machine would be taken off the track. I was sometimes present and saw it taken off, and sometimes I was not. I was present a couple of times when it was taken off.

The third wheel is fastened to the other part by a bar. I
47 could not say whether that bar on the third wheel can be taken off the balance of the machine. I have never seen it taken off. I always saw them together. When this accident occurred I had in my lap an axe, chain, tape line and half of a fence stave. The fence stave was about three inches wide and forty inches long, and half would be about 20 inches long, three inches wide and 1½ inches thick. The axe that I had was a 6-pound axe. That is what was marked on the blade. I cannot tell whether it was the axe-head or the axe-head and handle. The handle was a regular axe handle, probably about three feet long.

The chain was not very heavy. It was a light chain 100 feet long, made of steel. The tape that I had was just a solid steel, wound up. It would not make a very big parcel as I held it, about a foot in diameter. At the time of the accident, I had the axe, the chain and the stave in my hands. I had the axe in my right hand, and I was holding the stave with my left hand, across my legs. My left hand had hold of the stave, and the axe was in my right hand, the stave in one hand and the axe and chain1 in the other. The tape was in my pocket. During the four days when I traveled upon this machine, as it would wheel round curves I would sometimes
48 press on it and lean to one side or the other. I was leaning at the time of the accident. I always incline just a little that way, and I was leaning at this time. As I came out from the curve, my custom would be to straighten up again. I did not get

a chance to do that at that time. I would have straightened up in a short distance when the accident occurred.

(Counsel for the defendant calls attention of witness to Exhibit A.)

The witness then testified with respect to exhibit A as follows:

That upper dot on the left hand side is the rear wheel, that went off. Being asked by counsel to mark the little wheel, witness marks the wheel, marking the letter "A" beside the dot on the diagram.

Continuing, the witness testified:

The other two dots were the front and rear wheel on the other side of the machine. (Witness marks them B and C respectively). B is the front wheel on the right hand side and C is the rear wheel on the left hand side, and C is the rear wheel on the right hand side, and it went off on the left hand side of the track, wheel A. I am quite sure that that diagram substantially represents the curve and position of the wheel at the time of the accident. I do not think I can correct it.

Witness further testified:

At the time of the accident, I was riding on the front side of the wheel. Just at that time I was not giving any particular notice or attention to anything. Immediately prior thereto, I was just gazing ahead on the track, but just at that time, I was not giving any particular attention to anything.

I left the hospital about the 10th of October, but I am not positive about the day. I have not made any effort since then to obtain employment. I have not been strong enough, have not the use of my legs enough to permit me to do work. As a matter of fact I have not made any efforts to do so. It is only probably two weeks, probably eighteen days since I laid aside my crutches. I have never applied for employment since the accident.

Redirect examination.

By Mr. JACOBS:

There was nothing on the track, ahead of the machine at the time it left the track. The reason I have not tried to get employment was, I have never been able to do any kind of work, was not strong enough to do any kind of work, for the reason that I did not have the use of my leg.

Recross-examination.

By Mr. IVES:

(Counsel shows witness paper.)

That is my signature on that paper. Those two pages of questions and answers were signed by me. I do not remember the date when I made that statement. The question contained in that statement, "While you were on the seat, did you see anything wrong with

the track as you were going along," and my answer to that question, "I didn't notice particularly," is true, bearing in mind that I have testified that at the time of the accident I was not noticing particularly the condition of the track. I don't think it is possible that something might have been on the track which I didn't see. I was not noticing so very closely, but I think if there had been anything on the track I would have seen it. I know that I would. I don't remember that prior to the giving of my testimony in this case, the point was impressed upon me that it was important
51 that I should testify positively that there was nothing on the track at the time of the accident. I do not remember of ever receiving any instructions that it was important that I should testify positively that there was nothing ahead on the track at the time of the accident. I would not be positive that nobody made such suggestions to me, but I don't remember of any. I don't remember that any one suggested to me that it would be important for me to testify at this trial that there was nothing ahead of the gasoline engine or on the track at the time of the accident. I had conversations with respect to the testimony I was to give upon this trial, with my attorney. I do not remember that in the course of any conversation with respect to the testimony which I was to give upon this trial, anything was said about whether or not there was anything on the track ahead of the machine at the time of the accident. I cannot swear positively that nothing of that kind was said, but I have no remembrance of it.

JAMES C. RYAN called as a witness on behalf of the plaintiff, being duly sworn, testified as follows:

Direct examination.

By Mr. BAKER:

My name is James C. Ryan I am employed by the de-
52 fendant, the Gila Valley, Globe and Northern Railway Company, as transit and instrument man. I have been in its employ about nineteen months. On the 23d of April, 1907, I was employed in that capacity. The general duties of my employment were to start out with this motor car to locate mile posts along the Gila Valley, Globe and Northern Railway. I know the plaintiff in this case. At the time of the accident he was in the employ of the Gila Valley, Globe and Northern Railway Co. in the capacity of chain man, under Mr. Wright, indirectly under me. On the 23d of April, 1907, we started for Globe. We left there at 7 o'clock in the morning. Mr. Hall was with me. We traveled on the passenger train to Calva. Calva is about four miles north of Solomonville. It is between the town of Globe and Solomonville. On arriving at Calva Hall and myself proceeded to fill up the tank of the gasoline car and put it on the track. We were setting signs one mile out from such station. Mr. Hall and myself left Calva on that velocipede about twenty minutes after the passenger train arrived there. I do not know exactly what time we arrived there. It was about 8 o'clock

railroad time. That would be nine o'clock regular time, in
53 the morning. The velocipede was a three-wheel gasoline motor car. Its color was green. I observed the third wheel of that car on that day and I know its condition. The flange was worn a little at one place. The flange was just a little curved in one place where it was worn. The flange was worn inwardly toward the outside of the wheel. That particular flange which when next to the rail was curved; in the tread of that wheel there was a crack about two or three inches long. This crack was there the same as it is now. I saw that velocipede yesterday. The condition at the present time is practically the same as its condition on the 23d of April, 1907. There was no one else on that car on the 23d of April, 1907, other than myself and Mr. Hall. Hall was riding on the seat in front, over the front wheel on the right hand side. I was seated with my feet over the left side of the wheel. I was operating the car. We proceeded north with that car towards Globe. After we left Calva an accident happened about two miles north of San Carlos. That is in Gila county. The car left the track. At the point where the gasoline car left the track, the situation of the road with reference to being curved or tangent, was just coming off a
54 curve, a right hand curve, and going on a tangent. The car was just going off a right hand curve when the accident occurred. The car went off the left hand side of the curve going north. That would not be what I would call the inside of the car. The velocipede had three wheels. There are two wheels on the right hand side and one on the left hand side, and the one on the left hand side is opposite the first front wheel on the right. The third wheel on the left hand side of the car is called the "pony wheel." The car went off the track, upon the side of the third wheel. When the car went off the track, the one wheel went on the inside between the rails and the track outside, the one on the left went on the outside. The condition of the track at the point where the car went off was good as far as I know. There was nothing upon it in the way of an obstruction that I saw. When the car left the track, Hall was thrown in front of the car in the road, about four feet. I stayed with the car until it was practically stopped; then I was thrown to one side. I was operating the car at about ten or twelve miles an hour. The result of Mr. Hall's being thrown from the car was that his leg was broken in three places and his back was bruised. I sat him to one side of the track and ran about three miles and caught the work train and came back and brought him to Globe.

55 It was admitted by counsel for the defendant that the two wheels on the right side of the velocipede passed over the plaintiff's leg.

Cross-examination.

By Mr. Ivns:

I put Mr. Hall to one side of the track and then put the machine back on the track and ran to catch up with the work train. I knew

that the work train was ahead because we had set the car off the track previous to accident to let them by. It was about three miles from the place of the accident to where I caught the work train. I passed curves between the place of the accident and the work train. The capacity of the speed of that particular gasoline engine, the highest speed is 25 or 30 miles an hour, somewhere along there, and I left Hall to follow the work train I put on all the gasoline the machine would take. That is the way to make it run its fastest. I did not check the speed for curves. About ten minutes elapsed between the time I arrived at the work train and the time the work train started back. I could not say how fast the work train traveled on its way back. It didn't take over fifteen minutes to come
56 down there. At the time of the accident I was sitting over the right wheel. I was on the right hand side of the machine and my legs were over to the left. I was sitting sideways and Hall was sitting directly in front of me. If there was any obstruction like a pebble or dirt or stone or something of that kind on the track in front of us, I could not have seen it. Mr. Hall was riding in front of me. I am familiar with these gasoline machines. It is necessary in order to keep them on the track that equipoise be observed, just about like riding a bicycle, and if that equipoise should not be observed, the machine would be apt to jump the track, just as it did in this case.

Q. Now, if a pebble were on the track in front of the machine just coming off a curve, as this machine was at the time of the accident at the rate of speed this machine was going at that time, would that pebble tend to derail the machine?

Objected to by counsel for plaintiff on the ground that it is improper cross examination.

Objection sustained, and the defendant excepted.

57 The witness continuing testified.

As near as I can tell, this machine is at the present time in about the same condition as it was prior to the accident. The crack is about the same size. If a crack in the same place where this crack was in that wheel had caused the derailment of a machine of this kind as it was at the time of the accident, that crack would have become enlarged. After I discovered the condition of this wheel, as I have testified to, I operated the machine prior to the accident. I operated it upon curves and at a faster rate of speed than it was going at the time of the accident. The third wheel so-called is adjusted by the front wheel on the right hand side. There is a bar between the third wheel and the rest of the machine, and the character of the machine is such as to permit that wheel to be adjusted with reference to where it is parallel or at an angle with the wheel on the right hand side. I did not test that wheel on the 27th of April, 1907, or prior to the accident. I do not know that it had been adjusted by anybody. I know how it was adjusted at that time prior to the accident with reference to whether it was parallel or at an angle to the wheel on the right hand side. It was adjusted so that the front wheel would turn at an angle towards the center of

the track in front and away from the rail. The effect of
58 that adjustment would be to keep the flange away from the rail.

J. E. PRINTY called as a witness on behalf of the plaintiff, testified as follows:

Direct examination.

By ——— ———:

My name is J. E. Printy. I will be 38 years of age in December. I live at the present time at Globe, Arizona. I am working for Mr. Dean building a tank here at Cutter for the railroad company. I have been a car inspector and car repairer since 1892. I have worked in that capacity for various railroads since that time. I am familiar with the operation and running of cars and railroads. I have had some experience with the operation and running of gasoline velocipedes. I have seen them run and have operated them myself. I have had occasion to examine a velocipede in the neighborhood of the defendant's railroad depot. The car I examined was between the office and the railroad track, close by the car sheds. I went and looked at a three wheel gasoline velocipede. It was pretty well faded, but I should call the color of it green. I made an examination of that velocipede about six or eight weeks ago. I made an examination of the condition of its wheels. The third wheel
59 of that car is a worn wheel and has got a crack in it two and one-half inches long. The part of the wheel that is worn is what I call the tread of the wheel, the part of the wheel that runs over the rail when the car is in operation. The crack is in the tread of the wheel between the front of the flange and edge. It is about two and one-half inches long. The flange of that wheel I would call pretty well worn. The side of the wheel was worn. The side I refer to as having been worn is the inside of the whole of the flange. It was worn the same as any other car wheel that has been used for a certain length of time. It was worn in front of the flange and in different places. It was worn in places. I do not think I could describe the places, in some places thicker than in others. I cannot tell the depth of the worn places in the flange. I did not measure them. It was deeper than the surface of the flange. It was not what I would call gouging, but the wheel was worn in some parts of the flange more than in another.

Q. Was it worn in places so that the inside of the flange on its face presented any gouges to the rail?

Objected to by counsel for the defendant as leading.

60 The COURT: It is a leading question but it may be answered.

Counsel for the defendant excepts to the ruling of the Court.

A. Yes, sir; I would consider that it was.

Mr. IVES: I move to strike the answer out, that it appears to be an opinion.

The motion was denied, and the defendant excepted.

Q. Mr. Printy, in your opinion was that wheel unsafe and dangerous to use for the transportation of men upon?

Mr. Ivins: I object to the question as leading.

The Court: It is somewhat leading, but the objection will be overruled.

Defendant excepted to the ruling of the Court.

A. Yes, sir; I would consider it dangerous for a man to run except at a low speed.

The witness continuing testified:

The wheel I have referred to as being worn is the third wheel.

Q. Mr. Printy, taking into consideration the condition of the third wheel of this car as you saw it, and when that car was
61 in motion and going at a rate of speed of from ten to twelve miles an hour, and moving forward upon the track, what would probably occur to the car?

Objected to by counsel for the defendant, as not being a proper hypothetical question, for the reason that it has not been proven that there was no obstruction on the track, and on the further ground that it should call for an answer to a general interrogatory and not the specific interrogatory that concludes the question; and on the further ground that it is not a proper way to ask a hypothetical question, and for the further reason that it is incompetent.

Objection overruled and defendant excepted.

A. If I understand the question right, if this car was running, and the third wheel was on the left hand side and was going on a curve to the right, unless a man understood the motion of a car on the track, the bulge in the wheel might throw it off, without a man understood how to handle a car and without knowing these defects was in it. If he knew the use of it, it would be different. He could handle it on a curve so he could keep it on the track,
62 but if he didn't know, it is likely to leave the track.

Cross-examination.

By Mr. Ivins:

I came to Globe in June of this year. I am here building a tank here in Globe or around close to Globe. I am 38 years of age. Before I came to Globe I was doing prospecting in the mountains, for about six months. Before that I was running a saloon in Bisbee for about two years. The tank I am building now is a water tank for the Gila Valley, Globe and Northern Railway Company. I do not have charge of the construction of it. I am simply working upon it. Before I kept the saloon at Bisbee I was car inspector at Naco between the S. W. and what they call the Broad Gauge, the Green road between there and Cananea. I was car inspector for the various railroads I mention. I was first car inspector in 1894. I do not remember what month. I was car inspector then for about ten years, off and on. The first time I became car inspector was for

the H. D. & G. at Springfield, Ill., about 1894. They sent me to another place in Illinois and I was inspector of car repairs there for close on to two years. I left there and went to work for the
63 C. & S. at St. Louis. I worked for the W. E. L. in 1892, as car repairer. I was first a car inspector in 1894 in Illinois. I worked there as car inspector for two years. When I left there I went to Chillicothe, Missouri, and was car inspector there about three years. Then I went to another place in Missouri, and was car inspector for over two years. I went from there to Fort Worth, Texas. There was no intermission between these employments. When I left Illinois, I did first one thing and then another. I worked at carpenter work, and I stayed at home. I didn't do anything much, stayed with my father. It was about three months after I left work in Illinois before I did work as car inspector. After that it was about a month before I again worked as car inspector. Then I went to Missouri and was car inspector there for two years. It was three or four months after that before I again worked as car inspector. Then I worked at Fort Worth, Texas, as car inspector for three or four months. After that it was about three weeks before I again worked as car inspector, and then I worked at Arkansas City. I worked there as car inspector about a year off and
64 on. Then I went from there to Oklahoma City and was car inspector there about two years. From there I went to Point Richmond, California. I went directly there without any intermission. I got a pass from there to Springfield; I didn't work as car inspector at Point Richmond. I went to Bakersfield. I was car inspector there for about four months. Then I went to Los Angeles to work for the Southern Pacific. I was a car inspector there about three months, and then went to Bisbee, Arizona. I was car inspector down there for about three or four months, and then started in the saloon business. I worked for the S. P., but I cannot remember the year. Mr. David Reed was master mechanic. I was there about three or four months. I went from Bisbee to Cananea. I was not car inspector there. I was car inspector at Naco for about eight months, and then went to Bisbee.

L. S. MEDLER called as a witness on behalf of the plaintiff, being duly sworn, testified as follows:

Direct examination.

By Mr. JACOBS:

My name is L. S. Medler. My age is 34 years. My business is gasoline engineer. I have been gasoline engineer off and on
65 for ten years; I will say eight. I have had about three months' experience in handling, running and operating a gasoline vehicle or velocipede running between Naco and Cananea. That is the only road I ever had any experience on with a gasoline motor.

I have examined a car here near the depot of the defendant, the Gila Valley, Globe and Northern Ry. That car is in the rear of Mr.

Mallard's office. Mr. Mallard, I understand, is the superintendent of the Gila Valley, Globe and Northern Ry. I made this examination a few days ago. The car I examined was a three wheel double cylinder gasoline motor, a fac simile of the one I ran on the C. Y. R. & P. It was green in color. The car I examined looked like it had been used for some time, the exact length of time, of course, I could not state.

Q. What is the condition in reference to it being in repair or out of condition?

A. Very bad; in very bad condition.

Counsel for defendant moves to strike out the answer of the witness to this question, on the ground that his testimony should be specific, and also, on the ground that the general condition of the car is not pleaded.

Motion denied and defendant excepted.

66 Witness continuing testified:

I examined one of the wheels of that cra, the small one. There are three wheels on the car. I generally call the small wheel the pony wheel; some call it the third wheel. It stands very near opposite the front wheel on the right hand side; it is attached to the car by an adjustable frame and can be taken off at any time desired by the party operating it. On the inside of the wheel there is a crack at least two inches long. From general observation it looks like the inside of the flange is cut in different places so that it is very rough, and it would have a tendency for a person to look at it to show hard and soft places in the wheel.

Counsel for the defendant moved to strike out the latter portion of the sentence beginning with the words "have a tendency."

The motion was denied and defendant excepted.

The witness continuing testified:

By the inside of the wheel I mean the inside of the flange that rides inside of the rail when the car is on the track. That is the part that runs next to the rail.

67 Q. Now, in your opinion, would that wheel be dangerous for the purpose of transporting men upon.

Objected to by counsel for the defendant as leading.

Objection overruled and defendant excepted.

A. I would not ride on it at all.

Q. In your opinion, is that wheel dangerous for the purpose of transporting men upon?

Objected to by counsel for the defendant as leading.

Objection overruled, and defendant excepted.

A. Yes sir.

Q. Mr. Medler, taking into consideration the condition of that wheel, the third or pony wheel as you call it of that car that you examined and the fact that that car was being operated at a speed

of from ten to twelve miles an hour, and was just going off a curve on a tangent, what would probably occur to that car?

Counsel for the defendant objected to the question as being immaterial and incompetent.

68 Objection overruled, and defendant excepted.

A. A car going at that rate of speed ten or twelve miles an hour in the condition of that wheel in front being worn thin in that manner it is bound to bounce and leave the track owing to the lightness of that part of the machine. Owing to the condition of that wheel going at that rate of speed, the worn places on that wheel would cause this wheel to bounce and leave the track. The worn places on the wheel being thin, it would cause this wheel to bounce and leave the track.

Cross-examination.

By Mr. Ivns:

With the condition of that wheel, I think that the car under those conditions would be bound to bounce and leave the track. In giving my answers I had reference to the rate of speed at which the car was going ten or twelve miles an hour. If the car were going faster its liability to leave the track would be greater. If I knew that that car just after that accident had run at a rate twice as fast as it was going then and around a curve and a similar curvature without going off the track, I would still hold to that opinion under
69 the conditions as described in my previous answer unless he rode the outside wheel to hold it on the track. My testimony with respect to the liability of that car going off the track was conditional upon whether or not a person was on the hind wheel, the side wheel. Whether if a party operating a car had been on the side wheel under these conditions and had understood his business the car would not have gone off the track, is according to the rate of speed. At a speed of ten or twelve miles an hour it is not apt to if it is weighted down. If there were two people on it he would not ride the outside wheel—on the third wheel. If anybody had been on the third wheel I think it would not have been apt to go off. The heavier the weight upon the car the more apt it is to stay upon the rail. If I knew that that same car in the same condition of repair had been operated at twice the speed over a similar curve with only one person on it and had not gone off the track, I would still give the answer I gave before unless he threw his weight on the front wheel, to hold it down. If this person who was riding on the car had thrown his weight on the front wheel, it would not have been apt to have gone off the track. By the front wheel I refer to the pony wheel.

Q. If a party on the rear wheel, who is operating the car
70 and the condition of the wheel was as you have testified to, would it not be his duty if he were a proper operator, to throw his weight on the front wheel and prevent the car from going off the track?

Objected to by counsel for the plaintiff as not proper cross-examination.

The COURT: It calls for a conclusion of law.

The objection is sustained, and counsel for the defendant excepted.

Q. Now, Mr. Medler, if a party operating the car and the condition of the pony wheel was as you have described it, had used due precaution in operating, due practical precaution, when going at the rate of speed which you have testified he could have gone, could he have prevented the car from going off the rail or not?

Objected to by counsel for the plaintiff as irrelevant and improper cross-examination.

Objection overruled.

Further objected to by counsel for the plaintiff as calling for a conclusion of the witness that he is not qualified to give.

Objection sustained and defendant excepted.

71 Q. Now, Mr. Witness, if a party operating that car at the rate of speed you have testified to, and was going around a curve as described, and the wheel being in the condition you have also testified to, if the operator had used reasonable precaution in holding down the pony wheel would that car under those circumstances have jumped the track?

Objected to by counsel for plaintiff as calling for a conclusion of law.

Objection sustained and defendant excepted.

The witness continuing testified:

Whether a party on the rear wheel operating the car going at the rate of speed and around the curve as testified to, the wheel being in the condition which I have testified, had put his weight upon the pony wheel the car would have jumped the track is according to the degree of the curve, if it is a short curve or a long one. Not having seen the degree of curves I would not know anything about their figures. If a person riding on the rear wheel of that car and operating it at the rate of 12 miles an hour around a curve, its radius being about 1100 feet, the wheel being in the condition to which I have testified, had thrown his weight upon the pony
72 wheel, I do not think that wheel would have left the track.

It was admitted by counsel for the defendant that the wheel that this witness has testified to is the same wheel that was on the velocipede at the time of the accident.

W. P. GREER called as a witness, on behalf of the plaintiff, being duly sworn, testified as follows:

Direct examination.

By Mr. BAKER:

My name is W. P. Greer, and I am 38 years of age. I am following mining occupation at the present time. I have been railroading

for nine years. I have worked for the Fort Worth and Denver and Texas, and Texas & Pacific, the Santa Fe and the Gila Valley, Globe and Northern, and the road between Naco and Cananea. I forget the name of it. To a certain extent that business gave me experience upon car operating and machinery on railroads. I have never had any experience in operating a gasoline velocipede. I have seen them operated and used about railroads where I have worked frequently. I looked over a velocipede in the rear of Mr. Mallard's office, the superintendent of the Gila Valley, Globe and
73 Northern Railroad Company, I think on Monday morning last.

The color of the car is a sort of green. It had three wheels. The name on that car was Fairbanks-Morse. I examined some of the wheels of it. I examined the pony wheel. That wheel is sometimes called the third wheel. I consider the condition of that wheel very bad. It had a crack in the face of it and the flange had three cut places in it. The crack was about 2½ inches long, and goes clear through the tire. The tread of the wheel did not seem to be worn to any extent. The flange was worn in three places that I noticed. It seemed to be cut in looked a good deal as if it had been cut with a hard instrument like it might have been gouged out with a file. I think there is three gouged out places there in the wheel; on the edge of the flange and other places on the part of the flange that rides next to the wheel.

Q. Mr. Greer, taking the wheel, taking a wheel in the similar condition that you saw and examined and a three wheel velocipede, and the velocipede operated at the rate of ten or 12 miles an hour, with two men going on it and just going off a curve to a tangent and no obstruction to the road, what would probably happen to that wheel?

74 Objected to by counsel for the defendant as immaterial and incompetent.

Objection overruled and defendant excepted.

A. Well, it would be liable to jump the track; that pony wheel would be liable to mount the track and go off on the pony wheel side.

Objected to by counsel for the defendant as immaterial and incompetent. Objection overruled and defendant excepted.

A. Well, it would be liable to jump the track, that pony wheel would be liable to mount the track and go off on the pony wheel side.

Q. What would cause it to jump the track

Objected to by counsel for the defendant as calling for a conclusion of the witness.

Objection overruled and defendant excepted.

A. Well, there could be two or three causes for it jumping the track, the least bit of an obstruction, like a stick.

Counsel for the plaintiff asked that the answer of the wit-
75 ness be stricken from the record, on the ground that it is not responsive.

Defendant's counsel submits that the answer was proper and should be allowed to stand.

Motion to strike out the answer granted by the Court to which ruling the defendant excepted.

The witness continuing testified:

Those places that are in the wheel that seem to be gouged out, if they should strike the edge of the joint between the rail or if the rail the least bit ajutting out of that rail the sharp edge of the flange would mount that rail and go off.

It was admitted by counsel for the defendant that the wheel examined by the witness is the same one used on the machine that plaintiff was hurt on the 23rd day of April.

Cross-examination.

By Mr. Ives:

If one of those gasoline engines, such as this was traveling at about 10 or 12 miles an hour, and there was a light obstruction on the track like a small piece of stick, that would be liable to derail it. A pebble on the track would not be so liable to derail
76 it as a stick. It could be derailed by a pebble. A parcel of gravel such as is used along the track being upon the rail, dirt or small pebbles, would be liable to derail it.

Q. Could a party operating a wheel, if it were going at that rate of speed around a curve with a radius of about 1100 feet, the wheel being in the condition that this wheel was in prevent its going off the track if it didn't meet with any obstruction?

A. If the wheel mounted the rail at a joint with the sharp flange, nothing would prevent it from going off the track.

Q. But if it were not at a joint?

A. It would not be so apt to jump the rail.

Q. The man operating it could prevent it from going off the tracks.

A. Yes, sir; I think he could.

Redirect examination.

By —— ——:

The answer which I have made to questions asked by Mr. Ives, have reference only to a wheel in the same condition in which I found this wheel upon my inspection last Monday. The same answers would not apply to a wheel in good condition.

77 Recross-examination:

If a new wheel of this kind should be running at that rate of speed around a curve, a stick upon the track would be liable to derail it, and if gravel, such as was described in the former question

were upon the track, it would be liable to derail it. A pebble would be liable to derail it just about the same. I do not know whether these wheels need a great deal of equipoise to keep them from derailing—the proper balance of those on the car. I never rode on one of them.

J. E. PRINTY, re-called by the plaintiff, testified as follows:

Direct examination.

By Mr. JACOBS:

Q. Calling your attention to the same wheel which you examined and about which you testified yesterday, the condition of the wheel as you saw it, I will ask you this question: If a wheel of this kind that you saw, in the condition that it was in is given average use and wear on the character of track, such a track as lies between Globe and Bowie, how long would it take to wear it down to the condition of this wheel as it was at the time you saw it?

78 Objection to by counsel for the defendant on the ground that it tends to prove something in connection with the wheel which is not included in the amended complaint; and on the further ground that there is no evidence to show that the defendant owned the machine when it was new, and that its present condition is all that can be met.

Objection overruled and defendant excepted.

A. Well, to my judgment it would take 14 or 15 months.

Cross-examination.

By Mr. IVES:

A. If this accident had been caused by the crack which was in that wheel being caught in any joints of the rails, the crack might or might not have been widened or lengthened or enlarged by the accident.

Q. Then, Mr. Printy, in your opinion, despite the way in which that wheel was worn, as you have testified to, in some places being worn through, some obstruction upon the track got into that hole with sufficient force to throw it off the track, then that would not have enlarged this weakened flange?

A. In the flange or in the wheel?

79 Q. No, the crack in the flange?

A. The two and a half inch crack in the flange is there. As far as getting anything in the hole, I didn't see anything in there. I didn't testify that it was because there is no way for anything to get in there that I can see. The flange is bulged out in one place and that might be liable to throw the car off the track, but as far as getting anything in that hole I don't know.

Q. Then you don't think the crack in the wheel could have led to this accident?

A. I don't know.

L. S. MEDLER, recalled, testified as follows:

Direct examination:

A. Are there any brakes on the third wheel of the gasoline engine?

Objected to by counsel for the defendant as immaterial.
Objection overruled and defendant excepted.

A. Yes, sir.

The witness continuing, testified:

80 There was a brake on the gasoline velocipede that I examined, but not on the pony wheel or third wheel.

Dr. L. E. WIGHTMAN, called as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:
I am a physician and surgeon and have been for about 11 years. I am a graduate of the Northwestern University.

Counsel for the defendant admitted that the witness is an expert physician and surgeon.

I attended the plaintiff, Mr. Hall, during his illness or when his legs were broken. He had two fractures on the right leg; one was a fracture of the femur, this long bone on the right leg, about the middle of the femur, an oblique fracture. There was a break of the outer bone of the leg below the knee, about the center, and a compound fracture of one bone about three inches above the ankle. The fracture of the lower fragment seemed to be cracked and extended towards the ankle. I mean that the bone was split downward towards the ankle. I made a measurement of Mr. Hall's leg in my office day before yesterday. I found a difference in the length of that leg and the length of the other leg. The left leg is the
81 longest now. The right leg is the one that was hurt. It is approximately two inches shorter. The injuries I noticed upon Mr. Hall are permanent and will remain with him through life. In my opinion it would render him less capable as a common laborer. In my treatment of Mr. Hall, I took a piece of bone out of the lower wound, about one and one-half inches long by one-half to an inch wide, split off. I mean the bone of the compound fracture. (Counsel shows witness piece of bone). The bone that I took out of his leg seemed to be about that size.

Cross-examination.

By Mr. IVES:

The wound seemed to be healed but as to after effects I could not say. When I say he is permanently disabled I mean that leg will remain two inches shorter. I don't mean anything more than that; there is nothing definite as to the injury. The sinews and muscles will knit together and become strong and the sum total of the permanent disability of plaintiff's leg by reason of this accident is that one

leg will always be two inches shorter than the other, and there will be considerable limitation as to the movement of the muscles. I mean that his leg does not work as freely as it did, but it
82 will support him and it ought to be strong. It will never be as good as the uninjured leg.

Dr. E. R. McPheeters, called as a witness on behalf of the plaintiff, being duly sworn, testified as follows:

My name is E. R. McPheeters and my business is physician. I have been a physician three and one-half years. I am a graduate of the Kentucky School of Medicine. I have had practice and experience in the treatment of fractures of limbs. I have seen various fractures in my own practice and the practice of others in clinics. I know the plaintiff, Mr. Hall. Last April and the summer of this year I treated him. I found him suffering with a fracture of the thigh, about a little below the middle of the femur, the outer fracture consisting of a complete fracture of the fibula, the outside bone of the leg about the juncture of the upper one-third with the lower two-thirds and a fracture of the tibia about three or four inches above the ankle joint, a compound inv.ated fracture. The point of the fracture was about three or four inches above the ankle. The lower fragment was split. I measured, or assisted in measuring the limbs of the plaintiff day before yesterday. I found a difference in
83 the length of the legs. The sound leg was longer and the broken leg shorter. The broken leg was approximately two inches shorter than the sound leg. I consider these injuries to the plaintiff to be permanent injuries and in my opinion they will render him less capable as a common laborer.

H. H. Bru, called as a witness for the plaintiff, being first duly sworn, testified as follows:

Direct examination.

By Mr. Stoneman:

My name is Howard H. Bru. My principal occupation during the last ten years has been life insurance agent. I don't know the standard mortality table which is used by life insurance agents in pursuance of that occupation.

Q. What table is used by life insurance agents for the purpose of determining the life expectation of men at certain ages.

Objected to by counsel for the defendant as immaterial, and on the further ground that the Northampton tables are the standard tables.

Objection overruled and defendant excepted.

84 A. Flitcraft's tables are a sort of vade mecum for insurance men. (Counsel hands witness paper.) That is the Flitcraft table to which I refer.

Q. Turn to the page there which shows the life standard, and tell me if you can determine from that table what the life standard of a man would be at the age of 35 years?

Objected to by counsel for the defendant as incompetent.
Objection overruled and defendant excepted.

A. It is 31 years and 78-100 at the age of 35 years.

The witness continuing, testified:
This is the standard table used by life insurance agents and by nearly all companies. It is sometimes called the American mortality table. It is compiled by Flitcraft. He publishes other insurance works. His works for life insurance are standard.

JOHN HALL recalled, testified as follows:

Direct examination.

By Mr. BAKER:

Q. When your leg was fractured, was there anything done
85 at the time to your fractured leg by your physician?

Objected to by counsel for the defendant as immaterial and irrelevant, and as not tending to prove any of the issues of the pleadings.
The objection was overruled and defendant excepted.

A. Removed a piece of bone.

The witness continuing, testified:
That piece of bone is here in my pocket. (Witness produces a piece of bone.) This piece of bone was taken out of the compound fracture above the ankle.

Mr. IVES: My objection is supposed to extend to all this line of testimony.
The COURT: It is in the record.
Counsel for the plaintiff offers the piece of bone in evidence.
Counsel for the defendant objects to the introduction of the piece of bone as immaterial and incompetent.
Objection overruled and defendant excepted.
86 Bone marked "Plaintiff's Exhibit B."

The witness continuing, testified:
I suffered physical and mental pain as the result of these fractures to my leg; and contractions of the muscles. It was continuous pain. The greater pain was between the twenty-first and thirty-first days, constant and continuous pain for about seventy days and lying in one position without a change. The worst pain was the work of the physicians opening the wound to drain it. Amounted to somewhere about seventy days.

Cross-examination.

By Mr. IVES:

(Counsel shows witness wheels.)

I think that is the wheel that was on the machine at the time of the accident.

(Counsel for the defendant offered the wheel in evidence, and same was received without objection).
Wheel marked "Defendant's Exhibit 1."

It was admitted by counsel for the defendant that the defendant owned the wheel that has been introduced in evidence, and the velocipede to which the wheel belonged, and that it owned
87 it for a year before and used it for a year prior to the accident. That it owned it at the time the plaintiff was using it and that he was using it in the discharge of his duties. That defendant had this wheel in use during the period of one year and prior to this accident and in the defendant's possession; that the defendant provided the wheel in question on the velocipede in question for the use of the plaintiff on the 23rd day of April, 1907, in the discharge of his duties.

Plaintiff rests.

Mr. Ivins: I move that the jury be instructed to bring in a verdict for the defendant for the following reasons:

First. There is no proof whatever that this particular accident was caused by the defect alleged.

Second. On the ground that the alleged defect was an obvious one, and that the fact of its existence must have been known by the plaintiff and that he, therefore, assumed the risk; that the fact that the plaintiff was entirely inexcusable has no effect of exempting him from assumption of the risk under well recognized authority, by reason of the fact that his lack of skill was not communicated to the defendant; and also upon the ground that there is no
88 proof that the defendant corporation knew of the alleged defect.

Motion denied, and defendant excepted.

James C. Ryan, called as a witness on behalf of the defendant, testified as follows:

Direct examination.

By Mr. Ivins:

I know the precise place where this car was derailed, and I have examined it since the accident. I can state from my own estimation how far the car ran with reference to the number of ties over which it ran after the accident and before it stopped. It ran about sixteen feet. I know the condition of the track at or about the place of the accident with reference to the joints of the rails. The position of the car at the time of the derailment with reference to the nearest joint was about eight feet. I know the degree of curvature at this curve which the car was just leaving at the time of the accident. With reference to the length of the radius of the circle of which the curve would have been a part, it was about 1900 feet. I don't know just exactly. It was about 1900 feet, I don't know just exactly. The greater the radius, the lesser the curve. Prior to the
89 time of this accident, I had run that car around curves greater than this curve at times when Mr. Hall was upon it at a greater speed than the day of the accident. I have run it around

all kinds of curves, both right and left. I used the car with Hall upon it the day before the accident.

Q. Do you remember anything that occurred in the operation of the car at that time that indicated that the flange was grooved?

Objected to by counsel for the plaintiff as calling for the opinion of the witness.

The Court: The objection is sustained.

It is not sustained because the question is leading.

Defendant excepted.

I noticed the alleged defect in this wheel the day before the accident. Mr. Hall, Mr. Regna and somebody else were present at the time I noticed it. As near as I can remember this was at Calva. I cannot say whether it was just about noon or late in the afternoon. The car at that time was on the track.

Q. Look at the wheel which is in evidence and observing the crack that is there close to the flange, upon what portion of
90 the wheel with respect to its being up or down at this time to which you refer?

A. It was up just like it is now, and it was clearly visible.

The witness continuing, testified:

I remember a conversation that was had at that time within the hearing of Mr. Hall, with respect to that crack.

Q. Please state as near as you can, the substance of such conversation.

Mr. Jacobs: We submit that it has not yet been established sufficiently to admit this conversation, that Mr. Hall heard the conversation. This witness has testified only that he was present, not that he was within hearing or that he heard it. We submit the proper predicate has not yet been established.

The Court: Let us discover whether Mr. Hall took part in the conversation.

Witness examined by the Court:

I do not remember that Mr. Hall took part in that conversation. Mr. Regna made the remark. I heard it. I do not know as it was made directly to me. Mr. Regna was standing with reference to Mr. Hall right near the velocipede. I could not say whether he
91 was in front or behind. He was standing right around it as well as can be remembered. I think he was standing near the wheel. I cannot state whether Mr. Hall was right next to it or off on one side. I do not remember how near to Mr. Regna he was standing. I do not know that Mr. Hall made any comment on the car or the wheel and I don't remember that he made any answer to Mr. Regna's remark.

The Court: The objection to the conversation is sustained.

Counsel for the defendant excepted.

Witness further examined by Mr. Ivins:

I answered that I did not know how far Mr. Hall was away from Mr. Regna at the time the remark was made. He was not twenty yards away. I cannot say the exact distance. He was near the wheel. Mr. Regna made this remark in his natural tone of voice. He could have heard it if he had been listening; he was really within hearing.

Mr. Ivins: I repeat the question to which the Court sustained objection. I will ask the reporter to read the question.

Reporter reads the question as follows:

92 Please state as near as you can the substance of such conversation.

The Court: The objection is sustained.

Counsel for defendant excepted.

Mr. Ivins: I offer to prove by this witness that at the time a conversation occurred at which this alleged defect and its probable effect was discussed.

Objected to by counsel for the plaintiff on the same ground as the objection to the question.

Objection sustained and defendant excepted.

The witness continuing, testified:

Over thirty stakes had been used by Mr. Hall and myself during the period of Mr. Halls' riding on this machine. On all of these occasions the machine stopped and Mr. Hall got off and would set the stakes. He got off on one side, depended on which way we were going from station to station. If we were coming, then on the right hand side, and if we were going, on the left hand side. I remember how that wheel was adjusted with respect to whether it was parallel to or at an angle with the opposite front wheel. It was ad-
93 justed so that the flange would be away from the rail toward the inside of the center of the track in front. The way you would run it to the flange would be toward the rail behind. The purpose of that adjustment was to keep the wheel from riding the rail.

My business is engineer and surveyor. I have been an engineer a little over five years, and I am familiar with the operation of gasoline motor cars and with respect to the aptitude of such machines to stay on the track or become derailed. I am familiar with the cause of derailment and with methods preventing derailment. I do not think that defect was of such a character to cause a derailment if the operator of the machine understood how to operate it. The function of the flange upon all wheels is to keep the car on the track. The flanges on all wheels are on the inside of the track.

Q. And if this flange was not there, the car would not stay on the track in going around a curve?

A. In some curves you go around, this flange never touches the rail.

Q. Due to centrifugal force?

94 A. Depends upon which way the car is going.

The witness continuing, testified:

At the time of the accident the car had practically stopped when I fell. I was thrown to one side. I cannot say whether at the time of the accident Mr. Hall was sitting on top of the fence staves or whether he had them in his lap.

Q. Now state the various things, if there be any, which might cause derailment of a car in practically good condition, a car of that character?

A. Well, a stick on the track or a rock, a small rock the size of your thumb nail might cause it if it was on the track where this wheel ran. If you were running very fast and bad places in the track, a high joint in the rail might cause this machine to jump the track, and if you are sitting on the front wheel or on the hind wheel as you go from a curve, if you should straighten up quickly, just off the curve, it would tend to lift this wheel up and might cause it to leave the track.

Cross-examination.

By Mr. STONEMAN:

At the date of this accident, I can say almost for sure that the front wheel was adjusted the way I stated, away from the rail,
95 the front of the flange of this wheel. I say "almost for sure" because I remember that the day before I looked at it and it was adjusted that way, but on the day of the accident before that trip I had not looked at it. From the day before until after the accident when I had occasion to look at it, I had not looked at the wheel at all for the purpose of determining how the adjustment was until I looked at it after the accident. I never paid much attention to it after the accident. I went down the other day to look at it. The adjustment could not have been disarranged very much from one day to the morning of the next day, because this outer bar here is fastened to a set screw, and you can tighten it up with a wrench. It could not have been disarranged by anybody riding on it unless that nut was loose. The day before the accident that nut was tight. I just felt of it with my fingers but didn't take a wrench. An adjustment with the fingers would keep that wheel from being wobbly. With my fingers and ordinary strength I could adjust that nut to keep that wheel from being wobbly. That is the adjustment upon which I based my statement that the nut was tight; that is, to keep the wheel from wobbling.

96 As an expert I would say that this was a safe wheel if it was limited as to speed.

Q. As an expert, without limiting speed, would you call it a safe wheel?

A. To run the car as fast as possible?

Q. Running the ordinary way in which a car would be put to ordinary use in transporting men to and from work, that work being the setting of mile posts?

A. No. Can I state the reason?

The COURT: We will give you an opportunity later.
The witness continuing, testified:

The purpose of adjusting the wheel was that the flange would be away from the wheel in front when the car was going forward, so as to keep it from climbing the rail.

Q. Now, would you say as an expert, that if there were notches and indentations and gouges in that third wheel, that it would contribute to the wheel climbing the rail?

Objected to by counsel for the defendant as calling for a conclusion of the witness and improper.

97 Objection overruled and defendant excepted.

The COURT: Answer "yes" or "no."

A. Yes, sir.

No, it is not a fact that a wheel in that condition, the condition of defendant's Exhibit 1, would be much more liable to climb the rail than if it were in good condition, because the way that car was adjusted, this flange running toward the center the gouges in this part (indicating) would tend as the wheel went around like that, to catch in the under part of the bar of the rail and that would not let this wheel jump at all. That is based to a large extent upon my belief that the car was adjusted. The car has always been adjusted that way, ever since I have had the use of it. I have been using that car off and on *on* for about ten months. It was adjusted in that way to keep it from climbing the rail, as I stated before. I cannot say what space there was between the forward part of the flange and the rail as it was adjusted on the 23rd of last April. I never measured. It wasn't two inches. It was far enough to keep this flange away from the car when the wheel revolved. I cannot say that it never touched the rail on the straight track. I never

98 noticed it. I won't say that it was adjusted that it was impossible for it to touch the rail. I don't think it was possible for it to touch the rail unless the car was shoved over. It would be possible for the flange of the wheel, with that adjustment on that day, to touch the rail. Whether the possibility would increase by reason of the wheel being on a curve, depends on which way the curve is. The wheel would run away from that rail if they would be on a curve to the left, to the third wheel on the left rail. The curve going round would not throw the wheel round. If the car were going upon a curve and suddenly went on to a straight tangent the tendency would not be to throw that third wheel in close to the rail, not on a curve to the left. It would draw it further away than on a straight track. I only know from practice and observation that on coming off a curve and going on to a curve to the left, this wheel is on what you would call the low side of the track, and this part of the flange sets away from it. The indentation that appears close to the crack on the wheel, defendant's Exhibit 1, would not tend to make that wheel more easily ride the rail, because, as I stated before, in going around a curve the wheel is going off that way and that that adjustment, the wheel is in towards the

track in one place, and when those notches would touch the
99 track, would be around here as you come up, and that would tend to keep the wheel closer to the rail, more than to throw it away. I am quite positive of that. The car was adjusted as I said the day before, so that the flange would most touch the rail when the car was running. That is, when the wheel comes around in front. You see if this wheel is adjusted as it is now and thrown back like this (indicating) the further you throw this part back, the further it turns the axle in like that and the further you turn it the other way, the further it turns the wheel back. If that wheel was adjusted on that day as I have testified, this part of the flange (indicating) would touch the rail. Whether it would always depends on the curve; sometimes it would be clear away, about like this, about this far. By this far I mean a little over two inches from this or about three-fourths of an inch away from the flange. In answer to questions asked me by Mr. Ives I mentioned a pebble about the size of my thumb nail, might be on the track. At the exact place of the accident, there was no work going on that I know of. There was one road crossing above, at a point in the track where teams passed over it. I know how recently a train had preceded our passage on that day. We set the car off the track about
100 a mile below to let the work train pass by. It was between five and ten minutes after the train passed over that point before we passed over it. I say a chip would also derail the car. The chip would have to be placed either lengthwise or crosswise on the rail in order to derail it. I cannot state that there was any chip or pebble on the rail at that time. I stated that so far as I knew, the track was in good condition, and I also stated that Hall was in front of me. I do not know of any impressions on the rail at that point. As near as I can tell, the derailment took place about eight feet from the nearest joint. There would not be a tendency to crowd a vehicle such as this was, over to the left as the vehicle left a left hand curve and went out on to a tangent. As to whether a new wheel, a wheel in good condition to be put to the use which defendant's Exhibit 1 is used the upper part of the flange is rounded or not and as to whether the part of the flange next to the rail would be similar in appearance to the outside of the flange, I never saw one exactly new; I saw them nearly new.

Q. Is a new wheel and a wheel in what you would call good condition so manufactured that it presents a sharp edge at the point where I indicate on defendant's Exhibit 1, where my finger
101 is, and where it strikes the upper part of the rail on the side edge?

Objected to by counsel for defendant, on the ground that it assumes a sharp edge on the wheel when new.

Objection overruled and defendant excepted.

A. As I said before, I never used an absolutely new wheel and I have seen them nearly new, and it is not as sharp as that. As an expert I would say it is not a fact that a wheel you would call in good condition would present as sharp an edge as the edge presented in the inside of the flange on defendant's Exhibit No. 1. With

reference to the rail on which the third wheel travels on a gasoline velocipede the seat of the person who is driving the velocipede is on the opposite rail, over the opposite rail. I mean that a velocipede designed to carry two people the seat for each person is over the two wheels. The operator is bound to sit over the two wheels, the hind ones and the other man in front can either sit over the first wheel in front or over the other wheel. There is a seat unfolds for a person to sit directly over the first wheel. At the time of the accident I was sitting over the hind wheel on the right hand side of the
102 machine. Mr. Hall was sitting right in front of me on the right hand side over the front wheel.

Q. How far in front of you was Mr. Hall sitting?

Objected to by counsel for the defence on the ground that that has all been gone over.

The COURT: No that objection is not well taken.

A. It must be all of four feet; it must be all of that. I don't believe I could hardly reach him unless I leaned over that way.

The third wheel travels on the opposite rail at a point opposite the front wheel on the other side of the two wheels. Mr. Hall at the time of the accident was sitting at least four feet in front of me. Taking into consideration *on* the point where the third wheel was traveling and the distance Mr. Hall was sitting from me and that I could see the rail where the third wheel was traveling to a certain point. I couldn't see it some ways ahead of the wheel. My view was obstructed by having to look at an angle to the left and Mr. Hall in front of me obstructed the view ahead. I did not look just in front of the wheel at the time the accident happened. I am still in the employ of the railway company, the defendant.

103 Redirect examination.

By Mr. IVES:

The machine used the wheel of which is in evidence in my opinion was safe going at a speed of twelve miles an hour. The reason I stated in my cross-examination this morning that I didn't believe that machine was safe for ordinary use at the time of the accident which reason I was not permitted to give by the court on the theory that counsel for defendant could ask it, is that an ordinary person coming on the car and not understanding it, it would be just like I was when I first got on the car. I wanted to run it as fast as I could to see how fast it would go. Another reason, they don't understand how to hold so it won't lift the little wheel off the track in going around a curve. The nut which is not present and which adjusts the machine is a thumb screw. You tighten it with your thumb or monkey wrench. The purpose in the operation of such a machine is the adjustment of this wheel. The adjustment of this wheel is just as essential as any part of the wheel. If not adjusted, it won't stay on the track any more than if you didn't have any flange.

Recross-examination.

By Mr. STONEMAN:

When I first got on the machine I was in the habit of speeding it up. I have been operating these machines nearly three years now. I gradually acquired knowledge of how to operate it; it didn't come to me all at once. I couldn't say what the average rate of speed of the kind used would be. You can run just as slow as you want to and run as high as twenty-five or thirty miles an hour. Ten or twelve miles would be an average rate of speed. It took some considerable experience for me to learn how to run these machines. Unless a man had seen them operated a good deal, going on them for the first one or two times in a casual kind of a way he would not know much about them. He would either have to be advised how to run them or try it himself.

F. N. DODGE called as a witness on behalf of the defendant, being duly sworn, testified as follows:

Direct examination.

By Mr. IVES:

I am a machinist by occupation; my initials are F. N.
105 Dodge, I have been a machinist for about fifteen years. I am in the employ of the Gila Valley, Globe and Northern Railway. I have been in their employ eight years. In my experience as a machinist I have had occasion to use and attend to the repair of a gasoline motor such as the one in evidence. I have used the particular machine in evidence. I used it since the 23rd of April, 1907; it was on the first and second of June of this year on a trip from here to Bowie; from Globe to Bowie. There was no one with me. I ran the machine from there to Thatcher the first day and from Thatcher to Pima that evening. I stayed at Pima that night and next morning I left for Bowie. I left one hour ahead of the passenger train time at Pima and was in Bowie fifteen minutes ahead of it. I think the passenger train was on time that day. The rate of speed I made with this machine on that day was about 22 miles an hour. The condition of the track between Pima and Bowie with respect to the curves, the curve out of Pima is in poor condition. There are curves more or less all the way through. I never stopped speed until I got to Tanker twenty miles from Bowie. I did not at any time slacken my speed by reason of the curves. I have examined the wheel that is in evidence since the accident and since I used it. In my opinion
106 that wheel attached to a machine running around a curve with a radius of not less than 1100 feet at a speed of not to exceed twelve miles an hour is safe. It would be safe for me at any rate of speed. I might be considered as an operator of skill.

Mr. IVES: If your honor please, I would like to have the record show now that he is qualified as an expert, and we assume that he is an expert, and therefore that he is an operator of skill.

The COURT: I think it is the only theory on which he is testifying.

The witness continuing, testified:

I had heard of this accident at the time I used this machine on the trip from Globe to Bowie in June, 1907. It was my duty to make repairs and alterations between the first of April, 1907, and the present date. This particular machine has not been repaired or altered since the accident of April, 1907.

Q. When you operated this machine on your trip from Globe to Bowie, was it in the same condition as it was at the time of the accident?

Mr. JACOBI: I'll ask the Court to instruct the witness to answer that providing he knows the condition at the time of the accident.

107 The COURT: Yes, that is a proper limitation. You may ask a preliminary question therefore. The question may not be answered in the form it was given.

Counsel for defendant excepted.

Examination by Mr. JACOBS:

Between the time the accident occurred to Mr. Hall and the time I made the trip I have testified to, this machine had been used. I was not present on the trip. I do not know of my own knowledge whether the machine was changed or altered in any manner upon any trip when I was not present.

Mr. IVES: I repeat my question and I ask you (the witness) whether you considered that that wheel when attached to the machine on your trip from Globe to Bowie in June, 1907, was safe or unsafe for such trip, which as a matter of fact you made?

A. Safe for that trip. (Mr. Ives hands witness plaintiff's Exhibit A).

Q. Mr. Dodge that diagram represents the railroad track. The north and south of it represent the respective points of the compass. The three dots upon it represent this machine at the time of

108 the accident. The dot on the left hand side of the paper represents this wheel in evidence. The wheel was going northward. Now, I ask you if a machine traveling around a curve in that direction, what would be the effect of the centrifugal force upon that machine with respect to the movement of the flange in one or the other direction?

A. It would keep the outside rail.

I am referring to rail with B and C upon it. As a matter of fact when going around a curve at a speed of twelve miles, a curve similar to this one, the flange upon that wheel would not be able to touch the rail, going around a curve like that designated upon that diagram, because it is a left hand curve, and it throws the vehicle over that way, to the right. It would not be possible for the grooves in that flange or the crack in that wheel to cause that wheel to derail when in motion going around a curve like that designated on that diagram at 12 miles an hour. As a matter of fact if the machine

were going around a curve like that designated on the diagram the presence or absence of a flange upon that wheel would have no effect upon its derailment.

109 Cross-examination.

By Mr. STONEMAN:

I have never known of a three wheel gasoline velocipede being derailed going around a curve of the kind the same as on this diagram. It is not beyond a physical possibility for a three wheeled gasoline car with a wheel like that of defendant's Exhibit 1 to be derailed as it is going around a curve and off on a tangent. I did not say I was the master mechanic of the railroad and was not on the 23rd of last April. I gave no reason for being able to testify as an expert. An expert on the running of gasoline motor velocipedes. I don't know that I would be classed as one.

Q. Has your testimony as you have given it in this case been such testimony as has been the result of your personal experience with these machines?

A. Yes, sir.

It is not confined to the particular use to which I put the machine on the first and second of June of this year only. I have not testified to the use of that machine on any other date; my testimony is not confined to the results of that trip alone. I made that trip on business of the Gila Valley, Globe and Northern. Mr. Reed,
110 the master mechanic of the road, directed me to make it. I went to take the numbers of cars. I was told to take this particular velocipede. I had orders from the superintendent of motive power, J. W. Smith, at Tucson to get those numbers and this particular velocipede was the only th-ng we had to go on unless I took an engine. I have used this velocipede just as often as I had the chance. I testified wrong when I said in answer to a question asked me whether this machine was used before I used it between the 23rd of April and the first and second of June by someone else. Nobody used this machine between the time of the accident and the time that I used it on the first and second of June: nobody used the machine to my knowledge. I should have known of its use. That machine was owned by the G. V., G. & N. about three years.

Q. Do you know whether prior to the 23rd day of April that that machine had ever left the track?

A. Yes, sir.

Q. How do you know?

Objected to by counsel for defendant as not proper cross-examination.

Objection sustained.

111 The COURT: I don't know about that. I see the point you are driving at. The objection is overruled.

Defendant excepts to the ruling of the Court.

It went off with me.

It went off a curve. It must have been about a year prior to this

accident on the 23rd of April, 1907. It was the same machine; it had the same wheels. That wheel has been on the machine ever since we have had it. The total use of that wheel approximately is about three years. It also left the track with Mr. Mallard. It went off a curve on that occasion. I couldn't tell how long ago it was.

Q. Well, approximately?

Mr. Ives: May it please your Honor, may I cross-examine the witness with respect to his knowledge of this?

The Court: It is too late now. If any other testimony of this sort is to be elicited you can.

Mr. Ives: May it please your Honor, I object to this question until he is examined as to whether he knows.

The Court: It comes to late. You may examine him on
112 that on re-direct when your turn comes.

Counsel for defendant excepted to the ruling of the court.

The witness continuing, testified:

It is approximately about one year. I am familiar with the construction of the third wheel of a gasoline velocipede of the make and kind of the velocipede in question. The inside of the flange of the third wheel where it comes next to the rail is slightly rounded. That portion of the flange would present something similar to the same appearance as the other side of the flange to which I have testified. A good wheel would be something similar on both sides of the flange. There would be no sharp edge on a new wheel. There would be no indentations if it were a new wheel or a good wheel. If it was a good wheel there would be no cracks where it presents a surface to the rail. I still consider that particular wheel a safe wheel notwithstanding it might have indentations and cracks and not present a sharp edge to the rail. If the wheel was running perfectly parallel with the track it would not be as safe as a new wheel, but set it at an angle and it is just exactly as safe with the wheel presenting
a sharp edge on the upper portion of the flange, where the
113 flange meets the upper part of the rail in a forward motion.

If the wheel were set at an angle one-eighth inch lead turn in to the center of the track, I mean turned toward the center of the track. An eighth of an inch, that's the way this wheel here would turn, an eighth of an inch. (Witness takes defendant's exhibit 1 and illustrates his remark.) I don't say there was an eighth of an inch play. At the time I ran it the angle of that wheel was so set that it would bear in runningon a straight track more than one-half an inch away from the upper inside portion of the rail. It wasn't set over at that time. It has been set at that angle, and was left at that angle whatever it was. I set it over a year ago. The setting has not been changed to my knowledge. The bolts with which I fixed the setting have never been changed, loosened or unloosened to my knowledge. The customary angle for the third wheel of this kind of a velocipede to be set at is one-eighth lead. It just hapened to be set at a greater angle than one-eighth at the time I rode it. It was not on account of the necessity for a greater lead because of the condition

of that wheel at that time. When these wheels were set, they
114 are supposed to set them one-eighth lead, so as to always keep the rail if possible. I would consider a wheel set at an angle this wheel is set at safe; under ordinary circumstances and with ordinary use, it would not leave the rail. I am referring to an ordinary wheel now. At the time I rode this wheel in June it might have been set at one-eighth more, maybe one-quarter altogether. I am prepared to say positively that allowing for the lateral play of the wheel on a track, allowing for the angles of a railroad track and of such track as existed at that time on the G. V. G. & N. between Globe and Bowie, allowing for the play that is allowed for in the construction of these machines and running at a rate of over 12 miles an hour, that the inside flange of that wheel would not have touched the upper portion of the inside rail, the upper portion of the rail upon which it travels. Under the conditions that existed at that time I am prepared to say that the inside portion of the flange of that wheel at that time would not have touched the inside upper portion of the rail upon which that wheel traveled, and with only from an eighth to a quarter inch leeway, I don't think it would. If the wheel were run on an angle and had play of an eighth of an inch, that's a different proposition altogether. If it had been set at an eighth lead and there is one-eighth lost motion, under
115 those conditions it is bound to run parallel. This condition would exist on any velocipede under those conditions. Set a quarter of an inch and one-eighth leeway it is true with the lost motion of an eighth of an inch that wheel set with a leeway of a quarter of an inch would touch the rail. All depends on the gauge of the wheel and it depends on the lateral motion you had between the rails. I do not assume that the rails are within one-eighth of an inch of being parallel with each other. If you only had an eighth of an inch, a rail that had flattened so that it projected an eighth of an inch over on the inside would take up the leeway provided for by this setting. It is true that a rail projecting between an eighth of an inch to quarter of an inch would take up the lateral motion and the flange might touch, but it might go by and not touch it at all. If the flattened rail projected over say a quarter of an inch if the wheel had passed over that particular spot and the surface of the wheel that was unaffected by the rail had passed over that spot, it might go over safely. It might hit it and it might not. I set this wheel over a year ago, right in front of the store house down there of the G. V. G. & N. The wheel was in practically the same condition that it is in now. I used my eye to determine the
116 leeway of an eighth to a quarter of an inch. I used my eye on that and the rail and the whole wheel. I don't use any measurement but my eye and no particular portion of the wheel, I take it as a whole; take it as a whole as it stands on the side of the rail and you can set either side of it.

The COURT: You mean the setting was done at this end?

A. Yes, sir.

The COURT: The angle that this wheel rode the track was deter-

mined by setting of those two bolts and not by anything at the other end?

A. Yes, sir.

Q. Mr. Ives asked you, Mr. Dodge, if there was a thumb screw with which you adjusted the setting of the wheel?

Mr. IVES: I asked Mr. Ryan.

The witness continuing testified:

I set that wheel over here on this track. There's a thumb nut on the other end. For the angle of the wheel I have to use a monkey wrench. You might try your fingers in setting that wheel to tighten it, to see if it was loose, that's all.

117 The COURT: What is the thumb screw at the other end for?

A. The frame of the machine goes right by here, two columns, this slips through and comes up through the frame.

The COURT: Would the adjustment of that affect the bearing of this wheel upon the rail?

A. This is the place to adjust. If you move that wheel out from the machine you lengthen this here, same as you lengthen it there. This is for the gauge of the wheel.

The COURT: Neither act affects the bearing of that wheel on the rail?

A. No, sir.

JUROR: That affects in other words the distance apart of the wheels?

A. If you are on the road and want to ship the machine in, you have always got your gauge by this setting here.

JUROR: Where do you set it over in order to get your one-eighth of an inch?

A. You have got to use your judgment on the one-eighth of an inch. But you set it by this here.

118 I mean you put it one-eighth of an inch farther away from the wheel and throw this side one-eighth of an inch nearer the rail. That will never slip. If the heavy rod were shortened and not the other, that would have a tendency to throw that wheel that way or this way. It would make no difference in my testimony if the wheel was loose upon its axle and had a lateral motion back and forth from an eighth to a quarter of an inch. It would make no difference in my testimony at all, because it don't amount to anything. It doesn't amount to an eighth of an inch. (Witness moves wheel on axle back and forth by way of illustration.) (Pointing to space between axle and wheel) that's not an eighth of an inch. It shows for itself. In setting this wheel at that angle for the purpose of obtaining this leeway I allowed for the lateral motion of the wheel at its axle, and it has got to have a little lateral motion; enough so the wheel will move free and easy. I don't know whether or not there is any side motion of that whole car. There is a set motion from side to side of that whole car which would more than take up all the leeway. If the inside portion striking the top of the rail, going forward, in certain places

it would climb the rail, then again it would not. It would
119 not be more liable then to climb the rail if it were new, and the edges were more rounded and smooth. In making that calculation I was considering whether I was using it or somebody else. If I were using it, it would stay on the track, because I would look out for all these things. I would look out for all projections of the track or frogs, anything that might be on the track and all such things. On a comparatively smooth track without any frogs and without any projections, I would look out for frogs in just the same way, not because the wheel was in that condition, but because of my own personal safety. If properly tightened the wear and jolting of the car in such travel as I made upon that machine would not affect the adjustment which I put there a year before. I myself examined it before I used it myself. I don't think in answer to a question you asked me I stated that I hadn't examined those nuts since I adjusted them. I forget whether I said I had examined that wheel for the purpose of determining whether the angle at which I adjusted it had been changed. If instructed by the railroad company to go some place on one of two vehicles, one a new machine with good wheels and the other one with a third wheel like this one, it would be
120 natural to take the new machine. I don't know as I would consider it safer. If two machines were set out there, one old one and one new one and I knew what the old one was and had used it, I would take it in preference to the new one. That wheel on the machine we have been speaking about would make no difference with me.

Q. Do you know whether before or after this accident Mr. Mallard was thrown?

A. Yes, sir.

Mr. IVES: I ask permission to cross examine him in respect to his knowledge.

The Court refused this request, to which ruling the defendant, by its counsel excepted.

A. It was before.

Redirect examination.

By Mr. IVES:

I was not present when Mr. Mallard was thrown from this machine. I have no personal knowledge whether the machine left the track or not. It is based entirely upon hearsay information. The cause of the derailment when the machine went off the track with me was a spread rail. I mean the gauge had been widened out.

121 The COURT: The gauge?

A. The gauge of the track.

The COURT: What do you mean by that?

A. The distance between the rails is 4 feet, 8 and a half.

A rail with a projection over, the flattening of it a quarter of an inch is a defective rail. I consider that it is necessary to be careful

when operating these machines to prevent them from derailing. I know the cause of the derailment at the time the machine left the track with Mr. Mallard.

Mr. JACOBS: Of your own knowledge?

Mr. IVES: I move to strike from the record the testimony of this witness that the machine left the rail with Mr. Mallard.

No objection from counsel for plaintiff.

The COURT: The motion is granted.

The witness continuing testified:

The distance from Pima to Bowie (consulting time table) is 47 and 8-10 miles.

JUROR: Is this motor cycle more apt to leave the rails or less apt to leave the rails with two men riding it than with one on it, at a curve?

122 A. No.

The COURT: Mr. Dodge, is the distance between the outside wheels of this motor cycle called the gauge of the wheels?

A. Yes, sir.

The COURT: That is called the gauge of the wheel?

A. Yes, sir; between the flanges.

The COURT: Is the gauge of the wheels on all cars the same?

A. Supposed to be practically the same.

The COURT: Now, do you know what is the gauge of this wheel, with its opposite wheel during the time it was in use?

A. Not in feet and inches.

The COURT: Can you give a close approximation of the distance between the edge of the flange of this wheel and the inner edge of the rail if the car were pushed as far to the right as it would go, so that the flange of the right wheel would be right against the rail, as far to the right as it would go?

A. Well, I would call it half an inch.

The COURT: Now, if the car were pushed over to throw
123 the right wheel right up against the rail, how far would the throat of the flange on the left wheel be from the inside of the rail?

A. Approximately half an inch.

The COURT: Then this mark along here, an inch and a half or two inches from the throat of the flange does not represent where the wheel ordinarily rides?

A. Ordinarily would be the edge of the rail and here's the other side of the rail.

Continuation by Mr. IVES:

I couldn't state how far the throat of the flange would be from the inner side of the rail if the car were going around a sharp curve at a high rate of speed, because the gauge of the cars makes a difference on a straight track. In running a wheel like this from Pima to Bowie going around curves, at times the throat of this flange would be more than half an inch from the inner side of the rail.

I could not state the greatest distance, approximately from an inch and a quarter to an inch and a half. This wheel being on the left hand side of the machine, and the machine going on a curve to the left, the throat of that flange would be thrown away from the rail.

124 The COURT: You say the standard gauge is four feet eight and a half inches?

A. Yes, sir.

The COURT: From what point to what point, from the inside to the inside, or from the outside to the inside, or how?

A. Inside to inside.

The COURT: I understand you to say something about differing on curves. Is the gauge different on curves.

A. I don't know; you will have to ask one of the engineers on that.

Recross-examination.

By Mr. STONEMAN:

When I adjusted this wheel a year ago I made the adjustment as the machine stood on track. I averaged it up on the adjustment with this wheel here (referring to defendant's exhibit 1, which was placed near the witness's chair). For the purpose of adjustment I considered the average proximity of this throat to the inside of the rail.

Q. Now, do you say that this throat being shelved this way, for lack of a better term, that it would not be possible for this wheel to be forced up on an inclination like this so that the edge

125 would strike the inside of the rail.

A. Here's your wheel thrown forward like that. This part here is holding the rail. Now that has a tendency to hold that wheel down, but if it is that way it will climb up. As the angles of the track present themselves and taking into consideration the lateral motion of the whole machine this wheel would not crowd up in the throat here more or less to the inside of the rail on which it travels.

This black mark here (indicating) where it hits the rail down here as it revolves this way (forward). Here's the rail. You can see it right here. This is somewhat exaggerated, but it's the same thing.

J. H. CALLEN, called as a witness on behalf of the defendant, being duly sworn, testified as follows:

Direct examination.

By Mr. IVES:

My full name is J. H. Callen; I am roadmaster of the G. V. G. & N. I see the wheel in evidence. I have used the machine with which that wheel was attached. I have used it since April

126 23d, 1907; I used it on the 25th and 29th of April. I had a Mexican with me. I operated it from Globe to Solomon-

ville. I went from here to San Carlos in one day; one day to Solomonville. I went at the rate of between eight and ten miles an hour. I have put it to a greater speed than that, but not on this occasion. I have been familiar with machines of this character for the last two years. That wheel, noticing the worn portions of the flange and the crack in the flange, I would consider safe going around a curve not to exceed ten or twelve miles an hour.

The COURT: Would it make any difference if it was on a right curve?

A. Well, yes. on a right curve, that wheel is on the right side.

The COURT: Would it be just as safe on a right curve?

A. It would be perfectly safe on a right curve.

The COURT: Just as safe as if it had no defects in it.

A. Yes, sir.

(Showing plaintiff's exhibit A). Looking at that diagram the machine is supposed to run to the north, to the top of the
127 paper, that being a left curve and this wheel being on the left side of the machine, in going around a curve like that, it would not make any difference whether there was any flange on that wheel or not. If there were a flange there it would not touch the rail. In going around a left hand curve the flange on this wheel performs no function whatever. Going around a left curve, at a speed of twelve miles an hour, that crack would not strike the rail at any time.

The COURT: Would it make any difference at different speed?

A. None at all.

The COURT: Would the degree of the curve make any difference?

A. Well not at all. In going around that kind of a curve puts the pressure on the two wheels on the opposite side.

The COURT: It would put the right wheels against the rail?

A. The two right wheels against the rail.

Q. Going eight miles an hour?

A. Yes, sir.

The COURT: On a curve of 100 feet radius?

128 A. Yes, sir.

The COURT: The two right wheels would be shoved against the rail?

A. Yes, sir.

The COURT: Is the gauge any different on a curve than on a straight track?

A. Yes, sir.

The COURT: Greater or less?

A. Never less.

The COURT: Never less.

A. Never. It's not safe to make it less.

The COURT: The gauge on a curve is not less than on a straight track any place on your road?

A. Greater if anything according to the degree of the curve some places four feet nine inches.

Cross-examination.

By Mr. JACOBS:

It would make no difference if there was no flange on that wheel, going around that curve. When the machine left the curve and entered on a tangent it would make a difference. Then you
129 would need a flange. You want a safe flange. I would call that a safe flange. If there were two velocipedes owned by the Gila Valley road one a new one in perfect condition and the other with a third wheel like this one and I was instructed by the company to take one of these machines to go out on the road to discharge my duty, if I was familiar with the old one, I would take the old machine in preference to the new. I mean to tell the jury that I would take the machine with the old wheel with a wheel like that on it in preference to the new machine with new wheels.

Defendant rests.

The COURT: I will call Mr. Mallard to the stand.

Mr. JACOBS: May it please the Court, while the Court perhaps has a right to enter into a proceeding of this kind, and it may be in the interests of justice and all that, still at the same time this plaintiff feels that he does not care to have any questions of error injected into the record with responsibility on his part, and inasmuch as the defendant has said in this case that he rests, I am in grave doubt about the propriety of doing this, unless it is by consent of the defendant and plaintiff.

130 The COURT: The Court will not permit the defendant to rest until it has asked the questions it desires.

Mr. IVES: I take an exception.

Mr. BAKER: Exception for the plaintiff.

C. C. MALLARD, called by the Court as a witness, testified as follows, having been duly sworn:

Examination by the COURT:

I am superintendent of the defendant corporation. I am an engineer by profession, and have been for about 25 or 26 years.

Mr. JACOBS: In order to make our exception good, the plaintiff desires to enter an objection to the question on the ground that the examination is not justified.

Objection overruled.

Plaintiff and defendant by their counsel both take exception to the ruling of the Court.

The witness continuing testified:

With the right hand wheels of a car moving at a speed of about eight miles an hour on a left curve, with a radius of not less than
1100 feet, the body of the car, that is the part of the car on
131 the two rails, would be forced over, and the right hand wheels would hug the outer rail, at a speed as low as eight miles an hour.

The COURT: That's all.

Mr. JACOBS: Do I understand the Senator (Ives) now that you rest after the introduction of the evidence of Mr. Mallard.

Mr. IVES: I withdraw my objections.

Mr. JACOBS: For the purpose of preserving any rights we think we may have, the plaintiff moves to strike out the testimony of Mr. Mallard on the ground that he does not appear to be a witness for either party to the action, not having been called to the stand by either the plaintiff or the defendant. For these remarks we ask that the testimony of Mr. Mallard be stricken out.

Motion denied by the Court, to which ruling counsel for plaintiff excepts.

Mr. IVES: I desire again to resume my motion that the jury be instructed to bring in a verdict in favor of the defendants on the ground in the first place that there is no evidence tending to establish that this alleged defect caused this accident. In the second place that the conclusive evidence is that this defect could
132 not possibly have caused this accident; upon the further ground that there is no evidence of knowledge by this defendant of the alleged defect, and on the ground that there is no evidence that the plaintiff knew or ought to have known of the defect.

Motion denied by the Court.

Defendant excepts.

Jury called into court. Roll call and all jurors found to be present.

The COURT: All testimony of Mr. Mallard is stricken from the record.

Mr. IVES: I take exception to the refusal of the Court to give instructions to the jury as requested by the defendant.

Instructions Given by the Court to the Jury.

Gentlemen of the Jury:

The pleadings in this case have been read to you and I think from the arguments of counsel in the case coupled with the reading of the pleadings and the instructions which I am about to give you, the issues are plainly enough defined in your mind so
133 that I need not re-read the pleadings to you.

The burden is upon the plaintiff to make out his case by a preponderence of the evidence.

By a preponderance of the evidence is not necessarily meant the number of witnesses, but if plaintiff has proven the material allegations of his complaint by such evidence as satisfies and produces conviction in the minds of the jury, he has proven his case by a preponderance of the evidence.

The employer is required to use ordinary care in furnishing reasonably safe appliances for the use of the employé in the performance of his duty, and keeping them in repair, and the employé is justified in relying upon the performance of this positive duty by the employer.

The employé assumes the risk ordinarily incident to the busi-

ness in which he is engaged, as well as those resulting from a defect in the appliances of which he has knowledge, or which are plainly obvious to him, but he does not assume the negligence of the employer in furnishing defective appliances.

The employé is not relieved from the duty of taking notice of such defects in the appliances as are plainly obvious to the
134 senses, but this does not compel him to know or investigate the employer's modes of business, under the penalty, if he does not do so, of taking the risk of the employer's fault in furnishing unsafe appliances.

Upon this question the true test is not in the exercise of ordinary care to discover dangers, by the employé, but whether the defect is known or plainly observable by the employé.

And in this connection you are further instructed that an employé is not charged by law with the assumption of a risk arising out of defective appliances provided by his employer unless his employment was of such a nature as to bring to his attention and cause him to realize and comprehend the dangers incident to the use of such appliances.

If the jury believes from the preponderance of the evidence that the plaintiff was in the employment of the defendant in the capacity of chainman in the engineering department or force of the defendant, and that defendant provided plaintiff a railroad gasoline velocipede for use in the discharge of his duty in locating places for mile posts along the line of the defendant's road, then the defendant was bound to use ordinary care in furnishing
135 plaintiff a reasonably safe velocipede for that purpose. And if you further believe from a preponderance of the evidence that the defendant furnished the plaintiff a velocipede with the inside of the flange of one of its wheels worn down or hollowed out or the face thereof worn through or cracked from long and constant usage, and that the defendant knew, or might have known by the use of ordinary care, that the said velocipede was defective in any of the particulars stated, and that the plaintiff did not know that it was defective in the particulars stated, and that such defects in said velocipede were not plainly observable, or that if plainly observable did not comprehend the risk incident to the use of such defective wheel, and that plaintiff was injured whilst using said velocipede in the discharge of his duty by reason of such defective velocipede, you should find a verdict for the plaintiff.

By ordinary care is meant that degree of care which an ordinary prudent person would exercise under like situation and circumstances.

If you find for the plaintiff, you are required to determine the amount of his damages.

In estimating the damage, you should consider his suffer-
136 ing of body and mind, if any there was; the fact, if it is a fact, shown by the evidence, that the injury he received is permanent, the extent of it; how far, if at all, the injury received renders him less capable and fit to pursue his calling and business; any loss of time shown; its value, if shown; and so con-

sidering said elements, the jury should assess such damages; within the demand of the complaint, as will reasonably and justly compensate the plaintiff for his injuries.

Negligence exists where one does something or omits to do something which an ordinarily prudent person would not have done or would have omitted to do under the same conditions and circumstances.

An employer is not bound to furnish the latest, newest, best or safest appliances, but is only required to use ordinary care in selecting and providing reasonably safe machinery and appliances for the use of the employé.

An employer is not liable to an employé for injuries alleged to have been caused by defective appliances, where such appliances are reasonably safe, if prudently used, though better ones could be obtained.

If the velocipede mentioned in the evidence was reasonably safe, if properly used, for the purpose for which it was intended to
137 be used, the plaintiff cannot recover, even though the velocipede was not in the best of condition or repair.

The fact, if it be a fact, that the velocipede in question was old or worn does not in itself show negligence on the part of the defendant; if the velocipede, though old or worn, was one of which a person of ordinary prudence would deem reasonably safe for the purpose for which it was to be used, the defendant is free from negligence.

No greater degree of care is required of an employer than that which a person of ordinary prudence would exercise under the circumstances; hence if the defendant, in furnishing the velocipede for use by the plaintiff and his co-employés, used such care as a person of ordinary prudence would in so doing, it is not guilty of any negligence, and the plaintiff cannot recover.

It is a rule of law that an employé assumes all the ordinary risks of his employment, and for injuries caused by such ordinary risks he has no right of action against his employer. Therefore the liability to derailment of a velocipede of the character described in the evidence was one of the ordinary risks of the plaintiff's
138 employment, and for injuries received therefrom he has no recourse against the defendant, unless you further find that the derailment was caused wholly by the defective condition of such velocipede and that the plaintiff did not know of such defective condition.

An employé who uses defective appliances without objection when he knows the condition of such appliances, assumes all risk of injury by reason of such defects. Hence, if the jury believe that the plaintiff knew the defective condition of the velocipede, (if the jury believe that it was in a defective condition) he assumed the risk of injury on account of such defective condition and the verdict must be for the defendant.

If the plaintiff knew as well as the defendant, the condition of the velocipede mentioned in the evidence and was as well able to

protect himself against injury on account of such condition as the defendant was able to protect him, the plaintiff cannot recover.

Whenever a claim for damages is asserted, the injury must be shown by the plaintiff to have been caused by the negligence of the defendant, and the happening of the accident, without additional proof that it was caused by the negligence of the defendant, is not sufficient to establish the liability of defendant.

139 The burden of proof is upon the plaintiff to establish all of the material allegations in the complaint, which are not admitted in the answer of the defendant, and that in order that the plaintiff may recover in this action, he must prove not only that there was a defect in the wheel of such a character as to make the machine of which the wheel was a part, unsafe, but also that the particular accident in which the plaintiff was injured was caused by such defect.

You are instructed that the fact that the condition of the wheel in evidence rendered the machine unsafe, if proved by a preponderance of the testimony, does not raise any presumption that the accident was occasioned by such defect.

If you believe from a preponderance of the evidence that the flange of that wheel and the crack in such wheel were by reason of centrifugal force impelled away from the rail upon which said wheel was running at the time of the accident, so that neither such flange nor crack could have been touching the rail at the time of the accident, then you are instructed that the accident was not occasioned by the defect alleged in the complaint, and the verdict must be for the defendant.

140 Mere defects alone, in a machine furnished by an employer for the use of the employé, is not sufficient to render the employer liable for an injury to such employée, unless the jury find that the accident which produced the injury complained of, was caused by such defects; and though you may find such a defective machine was furnished by the defendant and that the plaintiff was injured in the discharge of duty as alleged, if you further find that the cause of the accident is not disclosed by the evidence you must find your verdict for the defendant.

The negligence of the defendant charged in the complaint, consists in the allegation that the machine was unsafe, and if the jury believe that the machine, while old and worn and defective, was in such condition that the accident alleged could not have happened, by reason of the defects alleged, if the machine had been operated in a reasonably skillful and prudent manner, then your verdict should be in favor of the defendant.

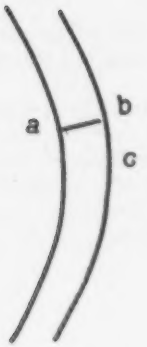
An employer may provide its employés with a machine with such defects as would make it unsafe and dangerous, if operated without skill and prudence, and that the providing of such a machine is not negligence as will entitle one injured in an accident caused by such defects to recover damages for injuries, if

141 the employer had provided an operator for such machine possessed of sufficient skill and prudence as to preclude by

no. 395.
Ry Co. et al
vs
Hall
p. 143

Plaintiff's Exhibit "A"

NORTH



SOUTH

Filed December 6th, 1907

the exercise of such skill and prudence the possibility of accident, by reason of such defects.

You will carefully weigh all of these instructions, gentlemen of the jury, and consider the evidence in the light of these instructions and in the light of nothing else.

At the conclusion of the taking of testimony the testimony given by Mr. Mallard was ordered stricken from the record. You will entirely disregard in your considerations those portions of the testimony which, after having been given, were ordered stricken from the record.

Consider this case precisely as though the defendant were some individual man, and do not take into consideration the fact that it is a corporation. I am as anxious as both of the parties to this suit that this verdict shall be one based upon an honest application of the law and not upon the application of any new law or upon the application of any theory of jurors as to what ought to be the law, or what ought to be done. But that you shall apply the law to these facts and honestly, fairly and faithfully give a square deal
142 to both of these parties.

In pursuance of these instructions, I have caused forms of verdict to be prepared for you, one in favor of the plaintiff awarding him damages as he is entitled to recover, the amount of damages, etc., and the other verdict in favor the defendant.

Your verdict must be unanimous.

Mr. Ives: I would like, on behalf of the defendant, to take exception to the order of the Court striking out the testimony of Mr. Mallard.

Defendant excepted to each and all the instructions given on request of the plaintiff, and those given by the Court upon its own motion, and also to the refusal of the Court to each of the instructions requested by the defendant and refused by the Court, and to each modification made by the Court in instructions requested by the defendant, except the one where the word "denied" was used instead of "omitted."

(Here follows diagram marked p. 143)

144 *Exhibits.*

PLAINTIFF'S EXHIBIT A.

Sketch or plan of track, position of velocipede, etc., made by plaintiff during the giving of his testimony.

PLAINTIFF'S EXHIBIT B.

Piece of bone taken from plaintiff's leg.

DEFENDANT'S EXHIBIT 1.

Wheel of velocipede.

The foregoing statements of facts contains all the evidence offered or received upon the trial of the foregoing entitled action, and contains all the evidence given upon the trial thereof.

The foregoing statement of facts, having been duly submitted to the undersigned, the Judge before whom said cause was tried, I do hereby approve said statement of facts and do certify that the same is correct.

And I do further certify that said statement of facts contain all the evidence offered or received upon the trial of the foregoing entitled cause, and all of the evidence given upon said trial.

Dated March 6th, 1909.

FREDERICK S. NAVE,
Judge.

145 (Filed Dec. 24th, 1908. Presented to Judge, March 6th, 1909. Returned and re-filed March 6th, 1909).

The following instructions were requested by the defendant and refused by the Court:

The jury are instructed to return a verdict in favor of the defendant.

Refused.

FREDERICK S. NAVE, *Judge.*

The jury are instructed that if the accident was caused by the failure of the plaintiff to adjust his person so as to maintain the equilibrium of the velocipede, or if such failure contributed to such accident, the plaintiff cannot recover.

Refused.

FREDERICK S. NAVE, *Judge.*

The jury are instructed that if they believe from the evidence that the condition of the velocipede and the dangers of using it in that condition were open and obvious to the plaintiff, he assumed

the risk of injury from such obvious defects or dangers. And
146 if the injuries received by him resulted from any such obvious defect or danger, he cannot recover in this action.
Refused.

FREDERICK S. NAVE, *Judge.*

The jury is instructed that the plaintiff must establish by a preponderance of the evidence that the accident alleged in the complaint was caused by a defect or defects in the wheel in evidence. If the jury believe that the accident in question may have been the result of any cause other than such defect or defects, the verdict must be for the defendant.
Refused.

FREDERICK S. NAVE, *Judge.*

The jury is instructed that the plaintiff must establish by a preponderance of the evidence that the accident alleged in the complaint was caused by a defect or defects in the wheel in evidence. If the jury believe that the accident in question may have been the result of any cause other than such defect or defects, the verdict must be for the defendant and the burden of proof is upon
147 the plaintiff to establish that the accident was not the result of any cause other than the alleged defect which might of itself have been sufficient to effect the accident.
Refused.

FREDERICK S. NAVE, *Judge.*

You are instructed under the evidence that if the plaintiff had opportunity to know the defects in the said wheel with respect to which testimony has been offered, prior to the accident, then the verdict should be for the defendant.
Refused.

FREDERICK S. NAVE, *Judge.*

The jury is instructed that if the alleged defect in the wheel in evidence was a defect of which the plaintiff knew, or by the exercise of ordinary care in the discharge of his duties might have known, the verdict must be for the defendant.
Refused.

FREDERICK S. NAVE, *Judge.*

148 The jury is instructed that there is no evidence tending to establish that the alleged defect or defects in the wheel existed prior to the day before the accident and that the mere fact that the witness Ryan knew of such defect or defects on the day before the accident is not sufficient to establish a knowledge of the alleged defect or defects by the defendant as to entitle the plaintiff to recover.
Refused.

FREDERICK S. NAVE, *Judge.*

The jury is instructed that the defects in the wheel with respect to which proof has been offered are all of such a character that they are obvious, and the jury must presume that the plaintiff knew of such defects prior to the happening of the accident and, therefore, if the jury believe that such defects are of such a nature that any man of ordinary intelligence would know that the same were liable or apt to cause the machine to derail, the verdict must be for the defendant.

Refused.

FREDERICK S. NAVE, *Judge.*

149 If the jury believe that the accident could not have happened if the operator of the machine had used reasonable skill and prudence in its operation, then the verdict must be for the defendant,

Refused.

FREDERICK S. NAVE, *Judge.*

The jury is instructed that if they believe from a preponderance of the evidence that the derailment of a machine, such as that in which the plaintiff was riding at the time of the accident, (the said machine being in perfect condition as to safety), may be brought about by one or more causes, then in order that the plaintiff may recover, he must prove by preponderance of the evidence that no one of such causes produced the accident by which the plaintiff was injured.

Refused.

FREDERICK S. NAVE, *Judge.*

You are further instructed that if you find from the evidence that the injury complained of in this case resulted from the negligence of the defendant in providing plaintiff with a defective appliance, as alleged in the complaint, and such injury was the result of such defective appliance, then the fact that plaintiff may have been guilty of contributory negligence in the use by him of such appliances shall not prevent his recovery if you further find that plaintiff's contributory negligence was slight and that of the defendant was gross in comparison; but if you should so find, then it is your duty, if you find from the evidence that plaintiff is entitled to any damages, to diminish the amount of such damages in proportion to the amount of negligence you may find attributable to plaintiff.

Refused.

FREDERICK S. NAVE, *Judge.*

150 And on to-wit: the tenth day of January, 1910, being one of the regular juridical days of the January Term of said Court, 1910, the following order, inter alia, was had and entered of record in said cause, in words and figures following, to-wit:

Title of Cause.

At this day it is ordered by the Court that this cause be submitted on briefs.

And on to-wit: the eleventh day of January, 1910, being one of the regular juridical days of the January Term of said Court, 1910, the following order, inter alia, was had and entered of record in said cause, in words and figures following, to-wit:

Title of Cause.

At this day, on motion of attorney for appellant herein, it is ordered by the Court that oral argument be granted in this cause, and the hearing set for January, 13th, 1910.

And on to-wit: the thirteenth day of January, 1910, being one of the regular juridical days of the January Term of said Court, 1910, the following order, inter alia, was had and entered of record in said cause, in words and figures following, to-wit:

151 Title of Cause.

This cause coming on at this time for hearing, was argued by Mr. E. S. Ives for appellant and by Mr. A. C. Baker for appellee, and cause ordered submitted.

And on to-wit: the twenty-first day of May, 1910, being one of the regular juridicial days of the January Term of said Court, 1910, the following order, inter alia, was had and entered of record in said cause, in words and figures following, to-wit:

Title of Cause.

In this cause it is ordered by the Court that reargument be had and cause set for hearing November 10th, 1910.

And on the same day to-wit: the twenty-first day of May, 1910, being one of the regular juridical days of the January Term of said court, 1910, the following other order was had and entered of record in said cause in words and figures following, to-wit:

Title of Cause.

On motion of Mr. S. L. Pattee for appellant herein, it is ordered that he be granted leave to file additional briefs in this cause.

152 And on to-wit: the ninth day of November, 1910, being one of the regular juridical days of the January Term of said Court, 1910, the following order, inter alia, was had and entered of record in said cause, in words and figures following, to-wit:

Title of Cause.

At this day comes Mr. A. C. Baker, attorney for appellee herein, and moves that the re-argument in this cause be set for Friday, November 11th, instead of November 10th, 1910.

And on to-wit: the tenth day of November, 1910, being one of the regular juridical days of the January Term of said Court, 1910, the following order, inter alia, was had and entered of record in said cause, in words and figures following, to-wit:

Title of Cause.

This cause coming on at this time for re-argument was argued by Mr. E. S. Ives for appellant, and the motion heretofore made by Mr. A. C. Baker for a continuance of the argument until Nov. 11th, 1910, was, Mr. Ives consenting, granted.

153 And on to-wit: the eleventh day of November, 1910, being one of the regular juridical days of the January Term of said Court, 1910, the following order, inter alia, was had and entered of record in said cause, in words and figures following, to-wit:

Title of Cause.

The cause having been continued from yesterday, and coming on now for hearing was argued by Mr. A. C. Baker for the appellee, and Mr. E. S. Ives for appellant, and cause ordered submitted.

154 And on to-wit: the fourteenth day of January, A. D. 1911, there was filed in the Clerk's office of said Court in said entitled cause a certain Opinion in words and figures following to-wit:

In the Supreme Court of the Territory of Arizona.

No. 1110.

GILA VALLEY, GLOBE AND NORTHERN RAILWAY COMPANY,
Appellant,
versus
JOHN HALL, Appellee.

Appeal from the District Court of Gila County.

Before Honorable Frederick S. Nave, Judge.

Eugene S. Ives and S. L. Pattee, for Appellant.
A. C. Baker and Messrs. Stoneman and Jacobs, for Appellee.

Opinion.

CAMPBELL, *J.*

Appellee was in the employ of appellant as chainman. On April 23rd, 1907, he was engaged with another employee, named Ryan, in

measuring distances, locating mile posts on appellant's line of railway. For that purpose they used a three wheeled velocipede furnished by appellant. This velocipede was of the kind ordinarily used in work of this character, with a gasoline engine for motive power. It had two wheels on the right hand side, over which
155 was the engine, and a seat for the use of the operator, and a seat in front for another person. The third wheel was a small wheel on the left-hand side, nearly opposite the front wheel on the right-hand side, and fastened to the machine by a bar extending across the track. On the day mentioned Hall and Ryan were upon this velocipede on *plaintiff's* line of railway, Ryan operating the machine and Hall sitting in front. While the velocipede was going at a speed of from eight to twelve miles an hour, it suddenly left the track, going to the left, the side on which was situated the one small wheel. Hall was thrown in front of it and run over, sustaining severe injuries. This action was brought against the railroad company to recover damages for the injuries so received, it being alleged that the flange on the third or small wheel was worn and cracked and that by reason of such condition the machine left the track, and that the company was negligent in furnishing such velocipede. Appellant answered, denying the negligence alleged, pleading contributory negligence and that Hall knew or might have known the condition of the velocipede and assumed the risks of the injuries resulting from the alleged defect.

The jury returned a verdict for ten thousand dollars. A motion for a new trial was made and prior to its determination Hall voluntarily remitted five thousand dollars from the amount of the
156 verdict. Thereafter the court denied the motion for new trial and entered judgment in favor of the plaintiff for five thousand dollars and costs. From this judgment and from the order denying the motion for new trial the railway company appeals.

We shall consider the assignments of error in the order in which they are argued by counsel. It is first insisted that the court should have directed a verdict at the close of the plaintiff's case, for the reason, as contended, that the testimony showed that at the time the velocipede left the track it was going north around a right-hand curve, and therefore, as stated by counsel, "would be impelled by centrifugal force toward the outer rail, and the two wheels on the right hand side would be held against the rail on that side, and the flange on the left-hand or third wheel impelled away from the rail.

The application of this natural law would result in the constant tendency on the part of the machine to keep straight ahead, and thus the flange on the left-hand side would be kept away from the rail, and its condition would have no effect while going around such a curve, and thus the condition of the flange could have no effect." The testimony shows that the wheel in question was badly worn and gouged, and there is expert testimony to the effect that the tendency of a wheel in such condition is to mount the rail.
157 It is true that the plaintiff testified that the accident occurred on the curve. However, in another portion of his

testimony, he states that at the time of the accident the car was just going off the curve on a tangent. The testimony of Ryan, the operator of the car, who later visited and observed the scene of the accident, is: "At the point where the gasoline car left the track, the situation of the road with reference to being curved or tangent, was just coming off a curve, a right-hand curve and going on a tangent. The car was just going off a right-hand curve when the accident occurred." It is argued by counsel for appellee, with much show of reason and supported by testimony of expert witnesses, that in leaving the curve the car was thrown against the left-hand rail and that the flange of the small wheel, because of its defects, failed to perform its functions. A careful consideration of the whole record convinces us that the jury was warranted in finding that the accident resulted from the defective wheel.

It is further insisted that the court erred in not directing a verdict for the defendant, for the reason that the evidence showed that the defects of the wheel were plainly observable, and the danger easily appreciated, and that therefore the plaintiff assumed the risk. It is true that the defects should have been discerned by any one whose duty it was to inspect wheels, but Hall was not an inspector,
158 nor did he have anything to do with the operation of the car. His only connection with it was to ride upon it from place to place, in locating mile posts.

Nor does it seem possible to say, as a matter of law, that he should have appreciated the danger had he known the condition of the wheel. He had but little experience with machines of that character. It does not appear that he had ever used any other track velocipede, and it does appear that he had been employed on the one in question but about fourteen hours at the time of the accident. One without experience in such matters might observe that the wheel was worn and yet not appreciate that it was in such condition as to be dangerous. In fact, the record in this case disclosed a wide difference of opinion among those who qualified as experts, as to whether or not an accident was likely to result from a wheel in the condition in which this one was shown to have been. The court did not err in permitting the case to go to the jury.

Appellant contends that the court in its instructions erred in stating the rule of assumption of risk by an employé in that it limited the defects, the risk of injury from which the plaintiff assumed, to those he actually knew or those which were plainly observable to him, and insists that an employé also assumes the risk of those he might or ought to have known through ordinary care. There
159 are authorities which support this contention but the question is determined to the contrary by our appellate court.

"Upon this question the true test is not in the exercise of care to discover dangers, but whether the defect is known or plainly observable by the employee." Choctaw, Oklahoma & Gulf Railroad Company vs. McDade, 191 U. S., 64.

The refusal of the Court to permit Ryan, the operator of the car, to testify to a remark made concerning the condition of the wheel, a short time before the accident, is assigned as error. Hall, Ryan,

and one Regna were in the neighborhood of the velocipede when Regna commented upon this alleged defect. Ryan was unable to state that Hall took any part in the conversation, could not state how far he was from Regna at the time, and there is nothing in the record to indicate with any reasonable certainty that he heard the remark. Therefore the testimony was properly excluded.

The remaining important question in the case, is whether the court erred in rendering judgment for the amount of the verdict less the sum remitted by the appellee. It is insisted by appellant that the court should have granted a new trial for the reason that it is beyond the power of a court to permit a remittitur where the damages are unliquidated and the verdict excessive. The question has heretofore been before this court in two cases. Southern Pacific Co. v. Tomlinson, 4 Arizona, 126; 33 Pacific 710, was an action to
160 recover damages for death by wrongful act, under a statute permitting the jury "to give such damages as they may think proportioned to the injuries resulting from said death". A verdict for $50,000.00 was returned, from which the plaintiff remitted $31,998.00, and judgment was entered for the remainder. The power of the trial court to permit the remittitur was questioned, but it was held:

"A trial court has the power, where excessive damages have been allowed by the jury, and where the motion to set aside the verdict is based upon this ground, to make a remission a condition precedent to overruling the motion. The exercise of this power rests in the sound discretion of the court. This doctrine is affirmed in the case of Cattle Co. v. Mann, 130 U. S., 74, 9 Sup. Ct. Rep., 458; also in Railroad Co. v. Herbert, 116 U. S., 642, 6 Sup. Ct. Rep., 590. Of course if it is apparent to the trial court that the verdict was the result of passion or prejudice, a remittitur should not be allowed, but the verdict should be set aside. In passing upon this question, the court should not look alone to the amount of damages awarded, but to the whole case, to determine the existence of passion or prejudice, and to determine how far such passion or prejudice may have operated in influencing the finding of any verdict against the defendant. When the circumstances, as they may appear to the trial
161 court, indicate the jury deliberately disregarded the instructions of the court or the facts in the case, a remittitur should not be allowed, but a new trial should be granted. If they do not so indicate, and the plaintiff voluntarily remits so much of the damages as may appear to be excessive, the court, in its discretion, may allow the remission and enter judgment accordingly.

In Southern Pacific Company v. Fitchett, 9 Ariz., 128, 80 Pac., 359, the verdict was for $1,000.00 for "injuries to feelings," from which the plaintiff, upon the suggestion of the trial court, remitted $600.00. This court held that it was apparent that the jury was influenced by passion or prejudice and that therefore a new trial should have been granted. We further sought to distinguish the facts in that case from the Tomlinson case, suggesting that in the latter the damages were susceptible of accurate computation from the evidence. We are not now prepared to adhere to the views so

expressed. Both are cases of unliquidated damages. In the one case no less than the other, the jury's verdict represents the damages "proportioned to the injuries resulting" in the opinion of the jury, based upon evidence that affords no basis for exact computation.

If there is a difference, it is one of degree rather than one of kind. There is authority for the position that in no case of unliqui-
162 dated damages should the court permit a remission where the verdict is excessive, without the consent of the defendant, but as we now view it, the great weight of authority supports the practice.

Northern Pacific R'l'd Co. v. Herbert, 116 U. S., 642,
Arkansas Cattle Co. v. Mann, 130 U. S., 69,
Kennon v. Gilmer, 131 U. S., 22.
29 Cyc. 1022-23 and cases cited.

It is argued that to permit a remittitur, or to require it as a condition of refusing a new trial, is to substitute the court's judgment for that of a jury, to the latter of which the defendant is entitled. But it is to the jury's judgment that defendants object when they appeal to the court for new trials on the grounds of excessive verdicts.

The trial court has undoubted power to determine whether the verdict is or is not excessive, and in considering the question usually determines in its own mind the maximum amount for which a verdict could with propriety be permitted to stand. Where there has been no error of law committed which would require a retrial and it appears that the excessive verdict has resulted from too liberal views as to the damages sustained, rather than from prejudice or passion, to permit a remission of the excess, instead of putting the parties to the expense of a new trial, promotes justice and puts an end to the litigation. Of course, if it appears that the verdict is tainted by prejudice or passion, and does not represent the
163 dispassionate judgment of the jury upon the question of the right of the plaintiff to recover, a new trial should be granted. But we think that the trial court is in a better position to determine whether the verdict is so tainted than is this court, and that unless it clearly appears from the record that the excessive verdict resulted from prejudice or passion, rather than from the liberality which jurors sometimes exercise in cases which appeal to men's sympathies, we should accept the trial court's determination. The trial court in this case has determined that the jury was not influenced by passion or prejudice and we see no reason for not accepting its conclusion.

Other rulings of the court are assigned as error and have received our consideration, but they are not of sufficient importance to warrant discussion here. We find no reversible error in the record, and affirm the judgment of the district court.

JOHN H. CAMPBELL, *A. J.*

We concur:
EDWARD KENT, *C. J.*
ERNEST W. LEWIS, *A. J.*
EDWARD M. DOE, *A. J.*

Special Concurring Opinion of Doan, A. J.

I concur in the result arrived at in this case, but not in the analyses given of the opinion of this Court in the Fitchett case.

This Court held in the Tomlinson case that a trial court
164 has the power to make a remission of excessive damages a condition precedent to denying a new trial, but said, "If it is apparent to the trial court that the verdict was the result of passion or prejudice, a remittitur should not be allowed, but the verdict should be set aside. * * * When the circumstances as they may appear to the trial court indicate that the jury deliberately disregarded the instructions of the court, or the facts of the case, a remittitur should not be allowed, but a new trial should be granted. If they do not so indicate and the plaintiff voluntarily remits so much of the damages as may appear to be excessive, the court in its discretion, may allow the remission and enter judgment accordingly."

In the Fitchett case, this Court held that it was apparent that the jury was influenced by passion or prejudice and that, therefore, a new trial should have been granted.

The trial court in the case now under consideration has determined that the jury was not influenced by passion or prejudice; the record discloses no reason for refusing to accept its conclusions; the affirmance of the judgment of the lower Court is, therefore, in perfect harmony with the former rulings of this Court in both the Tomlinson and Fitchett cases.

FLETCHER M. DOAN, (*A. J.*).

165 And on the same day to-wit: the fourteenth day of January, 1911, being one of the regular juridical days of the January Term of said court, 1911, the following order and Judgment, inter alia, was had and entered of record in said cause, in words and figures following, to-wit:

No. 1110.

GILA VALLEY, GLOBE & NORTHERN RAILWAY COMPANY, a Corporation, Appellant,

vs.

JOHN HALL, Appellee.

This cause having been heretofore submitted and by the Court taken under advisement, and the Court having considered the same and being fully advised in the premises:

It is ordered that the judgment of the District Court be, and the same is hereby, affirmed.

It is further ordered, adjudged and decreed that the appellee herein do have and recover of and from the Gila Valley, Globe and Northern Railway Company, a corporation, appellant herein, and M. P. Freeman and H. B. Tenney, of the city of Tucson, Arizona,

sureties on Supersedeas Bond herein, the sum of five thousand ($5,000.00) dollars, and costs in the district court taxed and allowed at the sum of two hundred thirty and 20/100 ($230.20) dollars, together with his costs in this court, taxed at twenty-eight and 50/100 ($28.50) Dollars.

166 And on to-wit: the twenty-fourth day of January, A. D. 1911, there was filed in the Clerk's office of said Court in said entitled cause a certain Motion for Rehearing in words and figures following to-wit:

(Title of Court and Cause.)

Motion for Rehearing.

Now comes the above named appellant, and moves the court for a rehearing of the above entitled cause, upon the following grounds:

1. That this court erred in affirming the judgment of the Court below and in holding that the evidence was sufficient to sustain the verdict.

2. That this Court erred in affirming the judgment of the court below and in holding that it was not error to exclude the evidence offered tending to show that a conversation occurred in the presence and hearing of the plaintiff in which the condition of the wheel alleged to have been the cause of the injury complained of, was discussed.

3. That this court erred in affirming the judgment of the court below and in holding that it was not error to permit the plaintiff to remit the sum of Five Thousand from the verdict as rendered

167 by the jury, and render judgment for the balance of said verdict.

4. That this court erred in affirming the judgment of the court below and in holding that said court did not err in the instructions to the jury complained of in appellant's assignment of error herein.

5. That this court erred in affirming the judgment of the court below and in holding that the court below did not err in refusing the instructions requested by the appellant as set forth in its assignments of error herein.

EUGENE S. IVES,
S. L. PATTEE,
Attorneys for Appellant.

168 And on to-wit: the twenty-second day of March, 1911, being one of the regular juridical days of the January Term of said Court, 1911 the following order, inter alia, was had and entered of record in said cause, in words and figures following, to-wit:

Title of Cause.

At this day it is ordered by the Court that the Motion for Rehearing filed herein by Appellant be submitted.

And on to-wit: the twenty-seventh day of March, 1911, being one of the regular juridical days of the January Term of said Court, 1911, the following order, inter alia, was had and entered of record in said cause, in words and figures following, to-wit:

Title of Cause.

At this day, it is ordered by the Court that the Motion for Rehearing filed herein by appellant, and heretofore submitted, be, and the same is hereby, denied.

And on the same day to-wit: the twenty-seventh day of March, 1911, being one of the regular juridical days of the January Term of said court, 1911, the following other order was had and entered of record in said cause in words and figures following, to-wit:

169 Title of Cause.

Comes now S. L. Pattee, Esq., for appellant herein, and moves that an order be made and entered in this cause substituting the Arizona Eastern Railroad Company in place of the Gila Valley, Globe and Northern Railway Company, for the reason that by consolidation of said Gila Valley, Globe and Northern Railway Company with certain other railway corporations, the said Arizona Eastern Railroad Company has become the successor of said Gila Valley, Globe and Northern Railway Company, and that said Gila Valley, Globe and Northern Railway Company has ceased to exist.

Thereupon, argument being had, the appellant is granted leave to withdraw said motion, and the motion is withdrawn.

And on the same day to-wit: the twenty-seventh day of March, 1911, being one of the regular juridical days of the January Term of said court, 1911, the following other order was had and entered of record in said cause in words and figures following, to-wit:

Title of Cause.

At this day, on motion of S. L. Pattee, Esq., for appellant herein, it is ordered that the Mandate in this cause be stayed ten days.

170 And on to-wit: the sixth day of April, 1911, there was filed in the clerk's office of said entitled court, in said entitled cause a certain Petition for Writ of Error in words and figures following to-wit:

(Title of Court and Cause.)

Petition for Writ of Error.

Now comes the Gila Valley, Globe and Northern Railway Company, a corporation, M. P. Freeman and M. P. Freeman and Grank H. Hereford, as executors of the last will and testament of

H. B. Tenney, deceased, by Eugene S. Ives, their attorney, and respectfully represent:

1.

That heretofore, and on the 26th day of October, 1908, a judgment was duly rendered in the District Court of the Fifth Judicial District of the Territory of Arizona, in and for the County of Gila, in favor of one John Hall and against the Gila Valley, Globe and Northern Railway Company, a corporation, in an action pending in said court, wherein the said John Hall was plaintiff and the said Gila Valley, Globe and Northern Railway Company was defendant, for the sum of five thousand dollars and costs, from which said judgment said Gila Valley, Globe and Northern Railway Company duly appealed to the Supreme Court of the Territory of Arizona; that for the purpose of staying the execution of said judgment,
pending said appeal, the said Gila Valley Globe and Northern
171 Railway Company gave a supersedeas bond, executed by itself as principal and by M. P. Freeman and H. B. Tenney as sureties.

2.

That thereafter said appeal came on to be heard before said Supreme Court of the Territory of Arizona, and was argued by counsel, and thereafter and on the 14th day of January, 1911, the said Supreme Court of the Territory of Arizona, rendered and entered its judgment in said cause, in and by which judgment it was adjudged and decreed that the judgment of the said District Court, therein appeal- from, be in all things affirmed, and that said John Hall recover of said Gila Valley, Globe and Northern Railway Company the amount of the judgment of said District Court, with interest, and the costs of both said courts.

3.

That in apt time said Gila Valley Globe and Northern Railway Company made a motion for rehearing of said cause, which motion was on, the 27th day of March, 1911, denied, and thereupon the judgment of said Supreme Court of the Territory of Arizona became and is final.

4.

That this cause was tried by a jury in the said District Court and a verdict was rendered in favor of the said John Hall and
172 against the said Gila Valley Globe and Northern Railway Company for the sum of ten thousand dollars, and thereafter the said Hall voluntarily remitted from said verdict the sum of five thousand dollars, and judgment was rendered in his favor for the sum of five thousand dollars and costs as aforesaid.

5.

That by the laws of the Territory of Arizona, to-wit by paragraph 2774 of the Revised Statutes of Arizona, 1901, as amended

by Chapter 84 of the acts of the Twenty-fifth Legislative Assembly of the Territory of Arizona, it is provided that interest shall be paid at the rate of six per cent per annum on all judgments, and that all judgments shall bear interest at said rate from the date of the entry thereof until paid, and by virtue of such laws the said judgment bore interest at said rate from the date of its rendition in the said District Court to the date of its affirmance by the Supreme Court of the Territory of Arizona, and by reason thereof, the said judgment, at the time of its affirmance by the Supreme Court of the Territory of Arizona, exceeding the sum of five thousand dollars, and the amount in dispute exceeds and did exceed at the time of the rendition of the judgment of the Supreme Court of the Territory of Arizona, the sum of five thousand dollars exclusive of costs.

173

6.

That in accordance with the laws of the Territory of Arizona, the Supreme Court of said Territory, upon the affirmance of said judgment of such District Court, rendered judgment affirming the judgment of the District Court and also adjudged that the said John Hall recover of the said Gila Valley Globe and Northern Railway Company and of the said sureties on said supersedeas bond, the amount of the judgment of said District Court with costs of both said courts.

7.

That subsequent to the execution of said supersedeas bond H. B. Tenney, one of the sureties on said bond, died testate, and thereafter his last will and testament was duly admitted to probate by the proper court *the* Pima County, Arizona, of which county he was a resident, and M. P. Freeman and Frank H. Hereford were duly appointed executors thereof; said executors duly qualified and letters testamentary were duly issued to them, and they ever since have been and are now the duly appointed, qualified and acting executors of the last will and testament of said Tenney.

8.

That the said Gila Valley Globe and Northern Railway Company and the said M. P. Freeman and the said M. P. Freeman and Frank H. Hereford, as executors of the last will and testa-
174 ment of said H. B. Tenney, deceased, now claim and assert that the Supreme Court of the Territory of Arizona committed error in its said judgment to their prejudice, and they now desire to prosecute a writ of error to the Supreme Court of the United States to review and correct the said judgment.

Wherefore, said Gila Valley, Globe and Northern Railway Company, and the said M. P. Freeman, and the said M. P. Freeman and Frank H. Hereford, as executors of the last will and testament of H. B. Tenney, deceased, pray that a writ of error be allowed accordingly, and that the record in this cause be transmitted to the Supreme

Court of the United States, and that execution of said judgment be stayed pending the hearing and determination of said writ of error upon giving a supersedeas bond in such amount as the judge allowing said writ of error may fix.

GILA VALLEY, GLOBE AND NORTHERN RAILWAY COMPANY,
By EUGENE S. IVES, *Its Attorney.*
M. P. FREEMAN.
M. P. FREEMAN AND
FRANK H. HEREFORD,
As Executors of the Last Will and Testament of H. B. Tenney, Deceased,
By EUGENE S. IVES, *Their Attorney.*

And now, upon reading the foregoing petition, the writ of
175 error is allowed as therein prayed, and the amount of the supersedeas bond to be given is fixed at the sum of Ten Thousand Dollars.

Dated April 5th, 1911.

JOHN H. CAMPBELL,
Associate Justice of the Supreme Court of the Territory of Arizona.

And on the same day to-wit: the sixth day of April, 1911, there was filed in the Clerk's office of said court in said entitled cause a certain Bond in words and figures following to-wit:

(Title of Court and Cause.)

Know all men by these present-: That we, Gila Villey, Globe and Northern Railway Company, a corporation, M. P. Freeman and M. P. Freeman and Frank H. Hereford, as executors of the last will and testament of H. B. Tenney, deceased, as principals, and Hugo J. Donau and Mose Drachman as sureties, are held and firmly bound unto John Hall in the full and just sum of Ten Thousand Dollars to be paid to the said John Hall, his certain attorneys, executors, administrators or assigns, to which payment well and truly to be made we bind ourselves our successors, executors, adminis-
176 trators and assigns, jointly and severally, firmly by these presents.

Sealed with our seals and dated this 4th day of April, in the year of our Lord one thousand nine hundred and eleven.

Whereas, lately at a session of the Supreme Court of the Territory of Arizona, in a suit depending in said court between Gila Valley Globe and Northern Railway Company, a corporation, appellant, and John Hall appellee, a final judgment was rendered against the said Gila Valley, Globe and Northern Railway Company, a corporation, appellant, on the 14th day of January, 1911, in all things affirming the judgment of the District Court of the Fifth Judicial District of the Territory of Arizona, in and for the County of Gila, therein appealed from, and adjudging and decreeing that the said

appellee, John Hall, do have and recover of and from the said appellant, Gila Valley, Globe and Northern Railway Company, a corporation, and of and from M. P. Freeman and H. B. Tenney, sureties upon the supersedeas bond on appeal, the amount of the judgment appealed from, with costs in both said courts, and

Whereas, after the execution of said supersedeas bond, the said H. B. Tenney, one of the sureties thereon, died testate, and his last will and testament was duly admitted to probate, and M. P. Freeman and Frank H. Hereford were duly appointed executors
177 thereof, and they thereupon duly qualified and are now such executors, and

Whereas, the said appellant, Gila Valley, Globe and Northern Railway Company, a corporation, did duly move the said Supreme Court of the Territory of Arizona, for a rehearing of said cause, which motion was, on the 27th day of March, 1911, by order of said Court, in all things denied; and

Whereas, the said Gila Valley, Globe and Northern Railway Company, a corporation, and the said M. P. Freeman and the said M. P. Freeman and Frank H. Hereford, as executors of the last will and testament of H. B. Tenney, deceased, have obtained a writ of error and filed a copy thereof in the office of the Clerk of the Supreme Court of the Territory of Arizona, to reverse the said judgment of the said Supreme Court of the Territory of Arizona in the aforesaid suit, and a citation directed to the said John Hall, citing and admonishing him to be and appear at the Supreme Court of the United States, to be holden at Washington, sixty days after the date of said citation:

Now, the condition of the above obligation is such, that if the said Gila Valley, Globe and Northern Railway Company, a corporation, and the said M. P. Freeman, and the said M. P. Freeman and Frank H. Hereford, as executors of the last will and testament of H. B. Tenney deceased, shall prosecute said writ of error to effect, and answer all costs and damages if they fail to make their
178 plea good, then the above obligation to be void, otherwise to remain in full force and virtue.

GILA VALLEY, GLOBE AND NORTHERN RAILWAY COMPANY,
By EPES RANDOLPH, *Vice President.* [SEAL.]
HUGO J. DONAU. [SEAL.]
MOSE DRACHMAN. [SEAL.]
M. P. FREEMAN. [SEAL.]
M. P. FREEMAN, [SEAL.]
——— ———,
As Executors of the Last Will and Testament of H. B. Tenney, Deceased.

Approved as a supersedeas and cost bond by
JOHN H. CAMPBELL,
Associate Justice of the Supreme Court of the Territory of Arizona.

UNITED STATES OF AMERICA,
Territory of Arizona, County of Pima, ss:

Mose Drachman and Hugo J. Donau, being duly sworn doth, each for himself and not one for the other, depose and say;
179 that he is one of the sureties named in and who executed the foregoing bond; that he is a resident and freeholder of the County of Pima and Territory of Arizona, and is worth the sum of Ten Thousand Dollars, specified in the foregoing bond, over and above all his just debts and liabilities and exclusive of property exempt by law from execution and forced sale.

MOSE DRACHMAN.
HUGO J. DONAU.

Subscribed and sworn to before me this 4th day of April, 1911.
[SEAL.] J. B. HENDERSON,
Notary Public in and for Pima County, Arizona.

My commission expires, May 9, 1911.

180 And on to-wit: the fourteenth day of April, 1911, came the Plaintiffs in Error by their attorney and filed in the clerk's office of said Court in said entitled cause, their certain Assignments of Error, in words and figures following, to-wit:

In the Supreme Court of the United States.

GILA VALLEY, GLOBE AND NORTHERN RAILWAY COMPANY, a Corporation; M. P. Freeman, and M. P. Freeman and Frank H. Hereford, as Executors of the Last Will and Testament of H. B. Tenney, Deceased, Plaintiffs in Error,

vs.

JOHN HALL, Defendant in Error.

Of October Term, in the Year of Our Lord One Thousand Nine Hundred and Ten.

Assignments of Error.

Afterwards, to-wit: on the 12th day of April, 1911, in this same term, before the justices of the Supreme Court of the United States at the Capitol, in the City of Washington, come the said plaintiffs in error, by Eugene S. Ives, their attorney and say that in the records and proceedings aforesaid there is manifest error, in this, to-wit:

I.

The Supreme Court of the Territory of Arizona erred in not reversing the judgment of the District Court for the reason that said District Court erred in denying the motion of the defendant
181 to strike out the answer of the witness L. S. Medler to the following question: "What is the condition in reference to

it being in repair or out of condition?" to which the witness answered: "Very bad, in very bad condition.", for the reason that said answer stated merely the opinion or conclusion of the witness, and was not a specific statement of the condition of the machine referred to and was not responsive to the question.

II.

The said Supreme Court erred in not reversing the judgment of the said District Court for the reason that said District Court erred in sustaining plaintiff's objection to the following question asked the witness Medler, viz: "Now, Mr. Medler, if a party operating a car and the condition of the pony wheel was as you have described it, had used due precaution in operating, due practical precaution, when going at the rate of speed which you have testified he could have gone, could he have prevented the car from going off the rail or not?" and in holding that in the said ruling of the District Court there was no error.

III.

The said Supreme Court erred in not reversing the judgment of the said district court for the reason that said District Court erred in sustaining the plaintiff's objection to the following question asked witness Medler, viz: "Now, Mr. Witness, if a party operating
182 that car at the rate of speed you have testified to, and was going around a curve as described, and the wheel being in the condition you have also testified to, if the operator had used reasonable precaution in holding down the pony wheel, would that car under those circumstances have jumped the track?" and in holding that in the said ruling of the District Court there was no error.

IV.

The said Supreme Court erred in not reversing the judgment of the said District Court for the reason that the said District Court erred in striking out the answer of the witness Greer to the following question: "What would cause it to jump the track?" to which the witness answered: Well, there could be two or three causes for it jumping the track; the least bit of an obstruction, like a stick."

V.

The said Supreme Court erred in not reversing the judgment of the said District Court for the reason that the said district Court *for the reason that the said District Court* erred in sustaining the objection of the plaintiff to the following question asked the witness Ryan, viz: "Please state as near as you can the substance of such conversation," and in holding that in the said ruling of the district court there was no error for the reason that the conversation asked for by said question was competent and admissible to prove notice

and knowledge on the part of the plaintiff of the alleged de-
183 fects and the dangers arising therefrom, and that it was sufficiently shown that such conversation occurred in the hearing of the plaintiff, and that there was sufficient evidence to warrant the jury in finding that plaintiff heard such conversation, and the question whether he heard it should have been submitted to the jury.

VI.

The said Supreme Court erred in not reversing the judgment of the said District Court for the reason that the said District Court erred in rejecting the defendant's offer to prove the conversation referred to in the last assignment of error and in sustaining plaintiff's objection thereto for the reason stated in the 5th assignment of error.

VII.

The said Supreme Court erred in not reversing the judgment of the said District Court for the reason that the said District Court erred in denying the defendant's motion that the court instruct the jury to return a verdict in favor of the defendant, made at the close of the evidence, and in holding that the said ruling of the District Court was not error, for the reasons following:

a. There was no evidence tending to prove any negligence on the part of the defendant.

b. There was no proof that the accident to the plaintiff was caused by the defects alleged.

c. It conclusively appeared from the evidence that such
184 defects could not have caused the accident.

d. The evidence showed conclusively that the alleged negligence of the defendant was not the cause of the accident.

e. That alleged defects in the velocipede were open and obvious and plaintiff knew, or by the exercise of ordinary prudence ought to have known, of such defects and the dangers arising therefrom and therefore assumed the risk thereof.

f. The evidence was insufficient to sustain a verdict on behalf of the plaintiff, or to establish a prima facie case.

VIII.

The said Supreme Court erred in not reversing the judgment of the said District Court for the reason that the said District Court erred in striking from the record the testimony of the witness Mallard for the reason that said testimony was competent and admissible and tended to maintain the issues on the part of the defendant, and was proper evidence to be considered by the jury.

IX.

The said Supreme Court erred in not reversing the judgment of the said District Court for the reason that the said District Court erred in instructing the jury as follows:

"At the close of the taking of testimony, the testimony given by Mr. Mallard was ordered stricken from the record. You will
185 entirely disregard in your considerations those portions of the testimony which, after having been given, were ordered stricken from the record," and in holding that in the said ruling there was no error for the reason that the testimony given by the said Mallard was material and competent, and was properly before the jury for consideration, and no reason existed in law for striking the same from the record.

X.

That said Supreme Court erred in not reversing the judgment of the said District Court for the reason that the said District Court erred in refusing to give the following instruction, requested by the defendant, viz: "The jury are instructed to return a verdict in favor of the defendant" and in holding that the ruling of the District Court in so doing was not error for the reasons stated in the 7th assignment of error.

XI.

The said Supreme Court erred in not reversing the judgment of the said District Court for the reason that the said District Court erred in refusing to give the following instruction requested by the defendant, viz: "The jury are instructed that if the accident was caused by the failure of the plaintiff to adjust his person so as to maintain the equilibrium of the velocipede, or if such failure contributed to such accident, the plaintiff cannot recover, and in
186 holding that the said ruling of the District Court was not error.

XII.

The said Supreme Court erred in not reversing the judgment of the District Court for the reason that the District Court erred in refusing to give the following instruction, requested by the defendant, viz: "The jury are instructed that if they believe from the evidence that the condition of the velocipede and the dangers of using it in that condition were open and obvious to the plaintiff, he assumed the risk of injury from such obvious defects or dangers. And if the injuries received by him resulted from any such obvious defect or danger, he cannot recover in this action," and in holding that in the said ruling of the District Court there was no error.

XIII.

The said Supreme Court erred in not reversing the judgment of the said District Court for the reason that the said District Court erred in refusing to give the following instruction, requested by the defendant, viz: "The jury is instructed that the plaintiff must establish by a preponderance of the evidence that the accident alleged in the complaint was caused by a defect or defects in the wheel in evidence. If the jury believe that the accident in question may have been the result of any cause other than such defect or defects, the

verdict must be for the defendant, and the burden of proof is
187 upon the plaintiff to establish that the accident was not the result of any cause other than the alleged defect which might of itself have been sufficient to effect the accident," and in holding that in the said ruling of the District Court there was no error.

XIV.

The said Supreme Court erred in not reversing the judgment of the said District Court for the reason that the said District Court erred in refusing to give the following instruction, requested by the defendant, viz: "The jury is instructed that the defects in the wheel with respect to which proof has been offered are all of such character that they are obvious, and the jury must presume that the plaintiff knew of such defects prior to the happening of the accident, and, therefore, if the jury believe that such defects are of such a nature that any man of ordinary intelligence would know that the same were liable or apt to cause the machine to derail, the verdict must be for the defendant", and in holding that in the said ruling of the District Court there was no error.

XV.

The said Supreme Court erred in not reversing the judgment of the said District Court for the reason that the said District Court erred in rendering judgment for the plaintiff and against the defendant for the sum of $5,000.00 and costs, for the following reasons:

188 *a.* The verdict rendered by the jury was grossly excessive and appeared to have been given under the influence of passion and prejudice.

b. The remitter of the sum of $5,000.00 was an admission that the verdict as rendered was grossly excessive.

c. The judgment was based, not upon the verdict of the jury, but upon the plaintiff's estimate of the amount of damages to be allowed.

d. The grossly excessive amount of the damages awarded by the jury vitiated the entire verdict and the vice could not be cured by the plaintiff by a voluntary remitter.

e. Instead of accepting the remitter and rendering judgment for the balance of the verdict, the court should have granted a new trial.

And the said Supreme Court erred in holding that in the said ruling of the District Court there was no error.

XVI.

There is error also in this, that judgment was given against the said plaintiffs in error, whereas by the law of the land the said judgment ought to have been given for the said plaintiffs in error against the said defendant in error.

Wherefore the said plaintiffs in error pray that the judgment aforesaid, so rendered by the said Supreme Court of the Territory of Arizona, against the said plaintiffs in error, may be reversed, annulled, and altogether held for nothing, and that they
189 may be restored to all things which they have lost by occasion of the said judgment.

EUGENE S. IVES,
Attorney for Plaintiffs in Error.

190 *Clerk's Certificate.*

UNITED STATES OF AMERICA,
Territory of Arizona, ss:

I, F. A. Tritle, Jr., Clerk of the Supreme Court of the Territory of Arizona, do hereby certify the above and foregoing to be a full, true and complete copy and Transcript of the Record in a certain cause lately pending in said court, No. 1110, wherein the Gila Valley, Globe and Northern Railway Company, a corporation, was appellant, and John Hall was appellee, including the Judgment Roll, Statement of Facts, Opinion, Judgment, Motion for Rehearing, Petition for Writ of Error, Bond on Writ of Error, Assignments of Error, and all minute entries had and entered of record, as the same remain on file and of record in my office.

And I further certify that the same constitute the record in said cause.

And I further certify that the attached Writ of Error, Citation, and Order of Enlargement, are the originals issued by said Supreme Court.

In witness whereof, I have hereunto set my hand and the seal of said Court, this 7th day of July, A. D. 1911, at Phœnix, Arizona.

[Seal Supreme Court of Arizona.]

F. A. TRITLE, JR.,
Clerk Supreme Court.

191 In the Supreme Court of the United States.

GILA VALLEY, GLOBE AND NORTHERN RAILWAY COMPANY, a Corporation; M. P. Freeman, and M. P. Freeman and Frank H. Hereford, as Executors of the Last Will and Testament of H. B. Tenney, Deceased, Plaintiffs in Error,

vs.

JOHN HALL, Defendant in Error.

Writ of Error.

UNITED STATES OF AMERICA, *ss:*

The President of the United States to the Honorable the Justices of the Supreme Court of the Territory of Arizona, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Supreme Court of the

Territory of Arizona, before you, or some of you, between Gila Valley, Globe and Northern Railway Company, a corporation, M. P. Freeman, and M. P. Freeman and Frank H. Hereford, as executors of the last will and testament of H. B. Tenney, deceased, plaintiffs in error, and John Hall, defendant in error, a manifest error hath happened, to the great damage of the said plaintiffs in error, as by their complaint appears.

We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington, on the 3rd day of June, 1911, in the said Supreme Court, to be then and there held, that the record and proceedings aforesaid being inspected, the said
192 Supreme Court of the United States may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness, the Honorable Edward D. White, Chief Justice of the Supreme Court of the United States, this 5th day of April, in the year of our Lord one thousand nine hundred and eleven.

[Seal Supreme Court of Arizona.]

F. A. TRITLE, JR.,
Clerk of the Supreme Court of the Territory of Arizona.

Allowed by
JOHN H. CAMPBELL,
Asso. Justice of the Supreme Court of the Territory of Arizona.

193 [Endorsed:] No. 1110. In the Supreme Court of the United States. Gila Valley, Globe and Northern Railway Company, M. P. Freeman, and M. P. Freeman and Frank H. Hereford, as executors of the last will and testament of H. B. Tenney, deceased, Plaintiffs in Error, vs. John Hall, Defendant in Error. Writ of Error. Filed April 6, 1911, F. A. Tritle, Jr., Clerk.

194 **In the Supreme Court of the United States.**

GILA VALLEY, GLOBE AND NORTHERN RAILWAY COMPANY, a Corporation; M. P. Freeman, and M. P. Freeman and Frank H. Hereford, as Executors of the Last Will and Testament of H. B. Tenney, Deceased, Plaintiffs in Error,

vs.

JOHN HALL, Defendant in Error.

Citation.

UNITED STATES OF AMERICA, *ss:*

The President of the United States to John Hall, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States, to be holden at Washington, on the third day of June, 1911, pursuant to a writ of error filed in the office of the Clerk of the Supreme Court of the Territory of Arizona, wherein Gila Valley, Globe and Northern Railway Company, a corporation, M. P. Freeman, and M. P. Freeman and Frank H. Hereford, as executors of the last will and testament of H. B. Tenney, deceased, are plaintiffs in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiffs in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Edward D. White, Chief Justice of the Supreme Court of the United States, this 5th day of April, in the year of our Lord one thousand nine hundred and eleven.

JOHN H. CAMPBELL,
Asso. Justice of the Supreme Court
of the Territory of Arizona.

195 [Endorsed:] No. 1110. In the Supreme Court of the United States. Gila Valley, Globe and Northern Railway Company, M. P. Freeman, and M. P. Freeman and Frank H. Hereford, as executors of the last will and testament of H. B. Tenney, deceased, Plaintiffs in Error, vs. John Hall, Defendant in Error. Citation. Service of the within citation is hereby admitted this 29th day of May, 1911. A. C. Baker, Stoneman & Jacobs, Attorneys for Defendants in Error. Filed May 29, 1911. F. A. Tritle, Jr., clerk.

196 In the Supreme Court of the United States.

GILA VALLEY, GLOBE AND NORTHERN RAILWAY COMPANY, a Corporation; M. P. Freeman, and M. P. Freeman and Frank H. Hereford, as Executors of the Last Will and Testament of H. B. Tenney, Deceased, Plaintiffs in Error,

vs.

JOHN HALL, Defendant in Error.

Order Enlarging Time.

And now, on this 27th day of May, 1911, good cause being shown therefor, on motion of Eugene S. Ives, Esq., counsel for the plaintiffs in error, it is

Ordered, That the time in which to docket this cause and to file the record in the above named court, and the time heretofore granted in which to file the transcript of the record and proceedings in this cause in the Supreme Court of the United States be, and is hereby enlarged and extended until the second day of August, 1911, and that the return day specified in the citation heretofore issued herein be enlarged and extended to August 2d, 1911.

JOHN H. CAMPBELL,
Associate Justice of the Supreme Court of Territory of Arizona.

197 [Endorsed:] No. 1110. Supreme Court, United States. Gila Valley, Globe and Northern Railway Company and others, Plaintiffs in Error, vs. John Hall, Defendant in Error. Order enlarging time to file record. Service of the within order is hereby admitted this 29th day of May, 1911. A. C. Baker, Stoneman & Jacobs, Attorneys for Defendant in Error. Filed May 29, 1911. F. A. Tritle, Jr., clerk.

Endorsed on cover: File No. 22,817. Arizona Territory Supreme Court. Term No. 395. Gila Valley, Globe & Northern Railway Company, M. P. Freeman, and M. P. Freeman and Frank H. Hereford, executors of H. B. Tenney, deceased, plaintiffs in error, vs. John Hall. Filed July 25th, 1911. File No. 22,817.

INDEX

	Page.
Statement of case	1
Argument	3
Court should have instructed jury to return verdict for the defendant	3-14
Errors in the admission and rejection of evidence	14-21
Errors in giving and refusal of instructions	22-26
Prejudice against the plaintiff in error	27-28
Propositions of law and authorities in support thereof.	
In order to justify the court in sending case to jury a scintilla of evidence is insufficient. The evidence must clearly tend to sustain a verdict for the plaintiff.	
Root v. Fay, 5 Az., 19; Randall v. R. R. Co., 109 U. S., 478; Richardson v. Powers, 11 Az. 31; 89 P. 542	3-4
Where facts proved are equally consistent with the absence of negligence as that of its existence, the question should not be submitted to the jury.	
McFadden v. Campbell, 34 N. Y. S., 136; Baulec v. R. R. Co., 59 N. Y. 356, at p. 366	12
If the injury may have resulted from one of two causes for only one of which the defendant is liable, the plaintiff must show with reasonable certainty that the cause for which the defendant is liable, produced the result.	

Warner v. St. L. & M. R. R. Co., 178 Mo., at p. 134;
Pierce v. Kile, 80 Fed. 865;
Ellison v. Truesdale, 49 Minn. 240——— 12-13

A verdict based on conjecture will not be permitted.

Wheelan v. Railway Co., 85 Ia. 167;
B. & O. R. R. v. State, 71 Md. 599;
Cumberland & P. R. Co. v. State, 73 Md. 74 14

An expert witness in testifying as to the condition of the velocipede which caused the accident must state specific facts and not his conclusion that its condition was very bad.

McMahon v. City of Dubuque, 107 Ia. 62—— 14-15

In cross examination of an expert witness it is proper to ask the witness if other causes may not have produced the result.

5 Ency. of Evidence, 632;
Schlenker v. State, 9 Neb. 241——— 15

An answer to a question to which the opposing counsel objected, cannot be stricken out upon motion of the party who propounded the question.

Hogan v. Shuart, 11 Mont. 498——— 17

Evidence offered by the defendant as to a conversation which the plaintiff might have heard is admissible, and it is for the jury to determine whether the plaintiff actually overheard such conversation.

Bush v. McCarty, 127 Ga. 308;
Berry v. House, 1 Tex. Civ. Ap. 562;
Wright v. Setwart, 130 Fed. 905——— 18

1 Wigmore on Evidence, Sec. 261——— 19

The court may call and examine a witness who has not been called by the parties.

8 Ency. Pl. & Pr., 72——— 20

The fact that evidence is cumulative is no reason for excluding it.

3 Ency. Evidence, 929 and note 39;
Barhyte v. Summers, 68 Mich. 34;
S. Danville v. Jacobs, 42 Ill. App. 533—— 20

Where the servant had the opportunity to know or in the exercise of reasonable or ordinary care should have known the risks to which he is exposed in the course of his employment, he will be held to have assumed them.

26 Cyc. 1196 and note 99;
26 Cyc. 1204 and note 17;
Thomas v. Mo. Pac. Ry. Co., 109 Mo. 187;
Thompson on Negligence, 1008;
H. & T. C. R. Co. v. Fowler, 56 Tex. 45;
Larson v. R. R. Co., 43 Minn. 423;
Ragon v. Ry. Co., 97 Mich. 265——— 23

Perigo v. Ry. Co., 52 Ia. 276;
Evansville Ry. Co. v. Henderson, 134 Ind. 636;
Linton Coal & M. Co. v. Parsons, 15 Ind. App. 69 ——— 24

IN THE

SUPREME COURT

OF THE

UNITED STATES.

GILA VALLEY, GLOBE AND NORTHERN RAILWAY COMPANY AND OTHERS,
Plaintiffs in Error

vs.

JOHN HALL,
Defendant in Error.

STATEMENT OF THE CASE.

The defendant in error was in the employ of the railroad company, plaintiff in error, as chainman. On April 23rd, 1907, he was engaged, with another employe named Ryan, in measuring distances for locating mile posts on such railroad company's line of railway. For that purpose they used a three wheeled gasoline velocipede, furnished by the company. On the day mentioned, Hall and Ryan were upon this velocipede going north, Ryan operating the machine, and Hall sitting in front. While the velocipede was going at a speed of about eight or ten miles an hour, and while going around a curve of the character shown in Exhibit A (Transcript, page 62), the velocipede suddenly left the track. Hall was thrown in front of it and run over, breaking his leg. The velocipede was of the kind ordinarily

used in work of this character with a gasoline engine as motive power. It had two wheels on the right hand side, over which was the engine and a seat for the use of the operator and another person. The third wheel was a smaller wheel on the left side, nearly opposite the front wheel on the right hand side, and fastened to the machine by a bar extending across the track. At the time of the accident, this third or small wheel was on the inside of the curve around which the machine was going, at the point marked "a" on the plat drawn by Hall and introduced in evidence.

Hall brought his action against the railway company to recover damages for the injuries so received, claiming that the flange on the third or small wheel was worn and cracked, and that by reason of such condition of the flange the machine left the track, and that the company was negligent in furnishing such defective velocipede.

The company answered, denying the negligence alleged, pleading contributory negligence, and that Hall knew or might have known the condition of the velocipede, and assumed the risk of injury resulting from the alleged defect.

Upon the trial the jury returned a verdict in favor of Hall for $10,000.00. The company moved for a new trial, and prior to the determination of this motion, Hall filed a remitter, voluntarily remitting $5,000.00 from the amount of the verdict. Thereafter the court denied the motion for a new trial and entered judgment in favor of Hall for $5,000.00 and costs. From this judgment and the order denying the motion for a new trial, the company appealed to the Supreme Court of the Territory, which court affirmed the judgment of the district court. Such judgment of affirmance is brought for review to this court by writ of error.

ARGUMENT.

The assignments of error may be readily divided into four groups:

1. Error in the refusal to direct a verdict in favor of the defendant, and the denial of the motion for a new trial based on that ground.

2. Errors in the admission and rejection of evidence.

3. Error in the giving and refusing of instructions to the jury.

4. Error in denying the motion for a new trial on the ground that the verdict was excessive.

The above grouping of the questions presented by the assignments of error may not be strictly logical, nor in natural sequence, but as the question of the sufficiency of the evidence to sustain the verdict is one which, if the position of the plaintiff in error be correct, renders all other assigned errors unimportant, or perhaps a consideration of them unnecessary, it will be first considered.

THE COURT SHOULD HAVE INSTRUCTED THE JURY TO RETURN A VERDICT FOR THE DEFENDANT.

It is realized, of course, that in the consideration of this question, this court will pay little attention to any discussion of a controverted question of fact. It is only where the evidence, with all fair and legitimate inferences arising therefrom, is so insufficient to sustain a verdict for the plaintiff that it would be the duty of the court to set aside such a verdict, if rendered, that a direction for a verdict in favor of a defendant is justified. But the doctrine that a scintilla of evidence is sufficient to send the case to the jury, does not obtain in Arizona. There must be evidence fairly tending to sustain a verdict for the plaintiff, and if the evi-

dence is such that a verdict for the plaintiff ought not to be permitted to stand, it is the duty of the court to direct a verdict for the defendant.

Root vs. Fay, 5 Ariz. 19.

Randall vs. Railroad Company, 109 U. S. 478.

Richardson vs. Powers, 11 Ariz. 31, 89 Pac. 542.

This question, therefore, presented by the 7th, 10th and 16th assignments of error, will be considered and the evidence reviewed in the light of these principles.

The complaint alleges that the velocipede was unsafe, defective and insecure, in this: "it was an old velocipede and out of repair, and the inside of the flange or rim of one of its wheels was worn and hollowed out, and the face of said wheel was worn through and cracked and broken," by reason whereof it is alleged that it ran off the track and injured the plaintiff. There is no proof at all in support of some of these sweeping allegations. It was not shown that the machine was of such an age as to render it unfit for longer use, nor was there any proof that the face of any of its wheels was worn through or broken, or that it was out of repair except as to the third or pony wheel. The whole evidence is directed to the condition of that one wheel. Our contention is that there is no evidence tending to show that such condition caused the accident; the liability to derailment of such a machine was one of the ordinary risks of the employment of those using it (Page 61, fol. 137). Under such circumstances there ought to be substantial proof that the particular accident involved was due solely to the condition of the third wheel, and not to this natural tendency or some other cause, before a court should permit a verdict resting on that basis to stand. The evidence shows nothing more than that the flange was worn, that there was a crack in the wheel, and that the velocipede went off the track.

The wheel is alleged to have been defective in that the flange was worn and that there was a crack in it. It was not argued by counsel in the lower courts that the crack in the wheel had anything to do with the accident; nor did the supreme court of the territory in its opinion regard the existence of such crack as calling for comment.

Ryan testified, (and his evidence was uncontradicted): "If a crack in the same place where this crack was in that wheel had caused the derailment of the machine of this kind, as it was at the time of the accident, that crack would have become enlarged." (Trans. p. 28, fol. 57). He further testified that the crack was in the same condition at the time of the trial as at the time of the accident. (P. 28, fol. 57).

Printy, one of the experts called by the plaintiff, when asked by defendant's counsel if he thought the crack in the wheel could have led to the accident, answered: "I don't know." (P. 37, fol. 79). This uncontroverted testimony was doubtless the reason why neither counsel for Hall, nor the Supreme Court of the Territory contended that the crack in the wheel could have been the cause of the accident.

It follows, therefore, that the judgment must be reversed upon the ground that there was no evidence to sustain the verdict, unless such evidence be found in the proof of the defective condition of the flange.

We submit that it is a physical impossibility that the defective flange could have caused the accident.

Our contention is based upon the uncontroverted testimony of Hall himself, that the car at the time of the accident was upon a curve which curved toward the left. The flange was on the inside of the wheel on the left hand side of the car. Therefore, the car was necessarily by centrifugal force impelled at the time of the accident toward the right, and the flange claimed to be defective was impelled away

from the track was performing no service, and, consequently no defect in it could have been the cause of the accident.

The Supreme Court in its opinion endeavors to meet this argument, as follows:

> "It is true that the plaintiff testified that the accident occurred on the curve. However, in another portion of his testimony, he states that at the time of the accident that car was just going off the curve on a tangent. The testimony of Ryan, the operator of the car, who later visited and observed the scene of the accident, is: 'At the point where the gasoline car left the track, the situation of the road with reference to being curved or tangent, was just coming off a curve, a right hand curve and going on a tangent. The car was just going off a right hand curve when the accident occurred.' It is argued by counsel for appellee, with much show of reason and supported by testimony of expert witnesses, that in leaving the curve the car was thrown against the left-hand rail and that the flange of the small wheel, because of its defects, failed to perform its functions. A careful consideration of the whole record convinces us that the jury was warranted in finding that the accident resulted from the defective wheel."

Counsel for the defendant in error, in their brief before the Supreme Court of the Territory, upon this point, argued:

> "There was no centrifugal force controlling the car or forcing it against the right hand rail. The evidence makes this clear. The accident happened on a tangent coming off the curve on a piece of straight track, and the centrifugal force had ceased to control the action of the car. Both appellee and Ryan, the only eye witnesses, so testify."

In support of such statement of fact counsel in their brief cited the evidence of Hall and the evidence of Ryan quoted in the foregoing quotation in the opinion of the Supreme Court of the Territory.

The testimony of Hall referred to in counsel's brief and which is all of the testimony of Hall upon the subject, is as follows:

"This car jumped the track as we were coming off the curve on a tangent right hand curve. We were coming off a curve." (P. 22, fol. 41).

This testimony was given by Hall upon his direct examination by his own counsel. Immediately thereafter his counsel propounded to him the following question:

"Q. Will you kindly take a sheet of paper and draw as near as you can, that curve, making the two rails, and showing the curve and the direction in which the track turned."

The witness thereupon drew the chart and marked the same, and testified in response to such question, as follows:

"That velocipede was running north at the time it left the track. That cross line indicates the third wheel of the car. The cross line that I have drawn upon the paper is the attachment from the two wheels from here to the third wheel running on the opposite side of the track. The accident occurred as we were leaving the curve and running upon a tangent just before we left the curve. I understand as a tangent a piece of straight track. That is my understanding of it." (P. 22, fol. 41-2).

Counsel for Hall thereupon offered the chart in evidence and it was received without objection. It appears at page 62 of the transcript.

The line a-b upon the chart shows the position of the car at the time of the accident, and it is obvious from it that the car was on the curve and not on a tangent, and that at such time the centrifugal force necessarily was impelling the car to the right hand side of the track and that the alleged defective flange was withdrawn from the performance of any service.

It cannot be contended that Hall's testimony upon this subject, whether deliberately or in making the chart was given carelessly. After giving this testimony, and upon cross examination, Hall testified: "As it (the velocipede) would wheel around curves, I would sometimes press on it and lean to one side or the other. I was leaning at the time of the accident. I always inclined just a little that way, and I was leaning at this time. As I came out from the curve my custom would be to straighten out again. I did not get a chance to do that at that time. I would have straightened up in a short distance when the accident occurred." (P. 24, fol. 48).

It is plain from this that the car was still on the curve and that Hall was continuing to lean in order to counterbalance the centrifugal force.

In order that there might be no possible mistake about the correctness of this chart, it was again called to his attention and on cross examination, he testified:

"I am quite sure that that diagram substantially represents the curve and the position of the wheel at the time of the accident. I do not think I could correct it." (P. 25, fol. 49).

This positive testimony of Hall himself, it seems to us is controlling as to the existence of this centrifugal force at the time of the accident.

We submit that it is not modified in any way by Ryan's testimony. In the first place, his testimony is not that the car was upon a tangent. It is that it was just coming off a curve and going on a tangent. The court will take judicial notice of the fact that it is the immutable law of nature that the centrifugal force when a car is coming off a curve, but is still upon it, will be as great, if not greater, than at any time in its progress upon such curve.

The flange of a wheel is a guard projected on the inside of the wheel below the portion of the wheel which rests upon the rail. The function of the flange is to prevent the wheel from going off the track on the side opposite to the flange. If the wheel should by centrifugal force have a tendency to so leave the track, the flange would crowd against the rail and prevent the wheel from leaving the rail. The purpose of the flange is purely protective. If the wheel should have a tendency to leave the rail on the outside of the track, the flange is there to prevent its going off in pursuance of such tendency, and this is its sole function. The flanges on the two opposite wheels of a car perform similar functions and only one is in service at the same time. If centrifugal force impels the car to the left then the flange on the inner side of the left hand wheel prevents the car from leaving the track toward the left, and the flange on the right hand wheel performs no function whatever; and conversely if the tendency of the car by centrifugal force is toward the right hand side, then it is the flange on the right hand wheel which saves the car from leaving the track, and the flange on the left hand wheel performs no service whatever.

In this case, as appears by Hall's chart, the curve was such that the centrifugal force was throwing the car toward the right, and its tendency, had there been no flanges upon the wheels, would have been to leave the track on the right hand thereof. It would have been the duty of the flange on the right hand wheel to prevent it from so leaving the track, but the flange on the left hand wheel which was the defective flange in question was performing no service whatever. A flange when called upon to do service, if defective, may fail to render it, and an accident by reason of the failure of the flange to render service could in such case properly be said to have been caused by the defective flange.

But when the momentum and tendency of the car are such that the flange is not called upon to render any service, then an accident from whatsoever cause may not properly be claimed to have been occasioned by the inability of the flange to render service. A servant, however incompetent or negligent, cannot be the cause of any damage done at a time when he is off duty.

Counsel for appellee seemed to find in the fact that the car left the track on the left hand side proof that centrifugal force was not operating to impel it toward the right. We cannot see force in this suggestion.

The laws of nature are unalterable and are never suspended. A car going forward as this one was, and upon such a curve as this curve was, must have been impelled by centrifugal force to the right. This fact, in conjunction with the similarly unquestioned fact that the car did actually go off to the left side of the track is proof conclusive that some force intervened, undisclosed by the testimony, whose effect was to lift the car from the rail and despite the centrifugal force which was impelling it to the right, to throw it to the left hand side of the track. That the centrifugal force was impelling it to the right is a fact which cannot be controverted. Therefore, it follows by mathematical demonstration that some intervening cause existed which threw the car to the left hand side, and it was this intervening cause which derailed the car and did the damage.

No other conclusion can be drawn from the evidence. Two salient facts stand forth uncontradicted and indeniable.

1. That at the time of the accident, the car was being impelled by centrifugal force to the right; and

2. That the car was thrown to the left.

These two facts are logically inconsistent with the absence of some third force. As to what that force consisted

of, there is no evidence, but its existence is a mathematical corollary from such two admitted facts. The shape of a stone, the shape of a stick, the angle at which the car may have hit an obstruction may have brought about this particular result, but, it was this undisclosed force or unseen obstruction which operated upon the car and was the proximate cause of the accident, and not the defective flange.

In order to sustain the verdict it must be proven that the accident was caused by the defective flange. We believe that we have affirmatively established that this accident could not have been caused by the defective flange. There is not one scintilla of evidence as to what did cause the accident. It is entirely a matter of speculation and conjecture.

It is plain from the testimony that it might have been due to a variety of causes, such, for instance as:

Failure of the operator so to handle the machine as to avoid the tendency to leave the track.

Testimony of Medler, (P. 34, fol. 71).

Testimony of Greer, (P. 36, fol. 76).

Failure of the persons riding the machine so to adjust their persons as to maintain its equipoise.

Testimony of Ryan, (P. 28, fol. 56).

An obstruction on the track like a small stick or stone.

Testimony of Greer, (P. 35, fol. 74).

Testimony of Ryan, (P. 44, fol. 94).

A high joint in a rail.

Testimony of Ryan, (Abstract, p. 28, fol. 56).

There is no proof that there was no obstruction on the track that might have caused this derailment. Ryan testifies that his view was obstructed (P. 47, fol. 102), and Hall testifies that he was paying no attention (P. 25, fol. 49). That the machine could be and was safely used, both before and after the accident is shown by the testimony of those who used it before the accident, running it at a high rate

of speed, and by the testimony of Ryan that immediately after the accident he replaced it on the track, and ran it as rapidly as he could, without reference to curves, in seeking assistance for his injured comrade.

For an accident resulting from any of the above enumerated causes the defendant is not responsible in this action, and the supposition that the accident resulted from one or more of those causes is as legitimate and finds as much of a basis in the evidence as that it was caused by the alleged negligence of the defendant.

Where the facts proved are equally consistent with the absence of negligence as with its existence, the question should not be submitted to the jury.

McFeddien vs. Campbell, 34 N. Y. Supp. 136.

Bauler vs. Railroad Co., 59 N. Y. 356, at page 366.

"If the injury may have resulted from one of two causes, for one of which, and not the other, the defendant is liable, the plaintiff must show with reasonable certainty that the cause for which the defendant is liable produced the result; and, if the evidence leaves it to conjecture, the plaintiff must fail in his action."

Warner vs. St. Louis & M. R. R. Co., 178 Mo. at page 134, 77 S. W. 67, at page 700.

Pierce vs. Kile, 80 Fed. 865.

It is apparent that the cause of this accident, or to what cause it is to be attributed, is pure speculation, resting not on positive proof or legitimate inference, but purely on conjecture. In such a case it is the duty of the court to direct a verdict for the defendant.

Ellison vs. Tweedale, 49 Minn. 240, 51 N. W. 918, was an action brought by an administrator against the receiver of a railroad company to recover damages on account of the death of his intestate. The alleged negligence consisted in leaving a hole between the rails at the point where

the deceased, a brakeman, was killed. The trial court directed a verdict for the defendant, and his action was affirmed on the ground that it did not sufficiently appear that the alleged negligence was the cause of the death of plaintiff's intestate. The court said:

"The probability that the accident was caused by the deceased stepping in this depression seems to be at least no greater than that it was caused in some other way equally consistent with the circumstances disclosed by the evidence. It may just as well be supposed that he was caught between the cars as they were forced together by the backward motion of the engine, or that, while between the moving cars, he made some misstep, from which, in that situation, he was not able to recover. This might occur irrespective of any real defects in the road bed. But the evidence shows the condition of the road bed to have been such that, even if it is to be inferred that the deceased was caused to stumble or to make any misstep by reason of any obstruction or inequality in the surface of the ground at this place, still there is at least as strong a probability that other obstructions, concerning which no negligence is alleged, caused the misstep as that the shallow sloping depression in the earth caused it. * * * Enough has been said to show that a finding that the injury was caused by the hole could rest only upon the bare conjecture that such may have been the fact. Such a verdict, if found, could not express the intelligent conviction of the jury from the evidence that this theory was probably correct. Hence the court properly directed the jury as to the verdict."

In this case, the physical conditions surrounding the accident render it far more probable that it was brought about by some cause, other than the alleged negligence. At best, taking the view of the evidence most favorable to the plain-

tiff the cause of the accident is so uncertain, that a finding in favor of the plaintiff on that issue could rest on nothing better than conjecture, and this may not be permitted.

Wheelan vs. C. M. & St. P. Ry. Co., 85 Iowa, 167, 52 N. W. 119.

Baltimore & Ohio R. Co. vs. State, 71 Md. 599, 18 Atl. 969.

Cumberland & P. R. Co. vs. State, 73 Md. 74, 20 Atl. 785.

ERRORS IN THE ADMISSION AND REJECTION OF EVIDENCE.

FIRST ASSIGNMENT OF ERROR.

The first error assigned is that the court overruled defendant's motion to strike out the answer of the witness Medler to a question asked him by plaintiff's counsel as to what was the condition of the velocipede, to which he answered that it was "very bad; in very bad condition."

Up to that time the witness had merely testified to his experience with machines of this kind, and that he had examined this particular machine. He had stated no specific facts which might be summed up in the conclusion expressed in his answer. The question called upon him to state, not to characterize the condition of the machine. What the witness meant by bad condition could not be told. It might mean anything from the wearing off of paint so as to mar its appearance, to the last degree of dilapidation. The witness should have been required to describe the condition, and his general opinion or conclusion that it was in bad condition was not admissible.

In a case where a similar question arose, it was held that a witness cannot give an opinion as to the condition of repair of a house destroyed by negligence, the criterion being its description in detail, from which the jury may determine its condition, the court saying:

"There might well be wide differences of opinion as to what would constitute good repair, and the court rightly held that the house might be described in detail, and from such evidence the jury determine its condition."

McMahon vs. City of Dubuque, 107 Iowa 62, 77 N. W. 517.

SECOND AND THIRD ASSIGNMENTS OF ERROR.

The second and third assignments of error are directed to the rulings of the court in sustaining objections to questions asked the witness Medler on cross examination. The witness had testified as an expert and had given his opinion as to the effect and probable consequences of the use of a wheel in the condition of the one involved. He had stated what, in his opinion might or probably would happen from the use of a wheel in that condition, under the circumstances stated in the questions propounded by plaintiff's counsel. The obvious purpose of his testimony was to furnish evidence from which the jury would be asked to draw the inference that the condition of the wheel was the cause of the accident. It was proper, therefore, on cross examination, to ask him if other things might not have caused it, or if it could not have been prevented by care on the part of the operator.

In the cross examination of an expert witness, it is proper to ask the witness if other causes might not have produced the given result, and counsel are not limited in such questions to matters shown by the evidence, but may base their questions on supposition or assumptions of matters not proven.

5 Enc. of Evidence, 632 and cases cited in note 2.

Schlenker vs. State, 9 Neb. 241, 1 N. W. 857.

The objections to these questions were not that they were not proper cross examination. An objection on that

ground was overruled. (P. 34, fol. 70). But the objection was made and sustained on the ground that the question called for a conclusion of law. It could hardly be said that the question whether one operating such a machine could by the exercise of due care prevent its derailment is a legal question. The questions called for conclusions, of course, but for such conclusions as a qualified expert would be entitled to give. In view of the fact that the only evidence which could be claimed to connect the condition of the wheel with the cause of the accident is the testimony of these experts and the inferences sought to be drawn, it was particularly important that their opinions should be fully tested and their opinions as to all possible causes of the accident be considered by the jury.

FOURTH ASSIGNMENT OF ERROR.

The fourth assignment of error questions the correctness of the ruling of the court in striking out an answer of the witness Greer to a question put by plaintiff's counsel.

The witness had testified that, under the circumstances detailed in a hypothetical question, the pony wheel would be liable to mount the track and go off on the pony wheel side. He was then asked: "What would cause it to jump the track?" To this he answered, "Well, there could be two or three causes for it jumping the track, the least bit of an obstruction, like a stick." The answer was stricken out on motion of the plaintiff, as not responsive answer. It needs no argument to show that the answer was strictly responsive. He was asked what would cause the wheel to jump the track and he stated what would do so.

A party is not entitled to have the answer of a witness stricken out because it is unfavorable to him. Nor does the fact that the defendant objected to the question which called forth the answer, entitle the other party to have it stricken out.

A similar situation was presented in Hogan vs. Shaw, 11 Mont. 498, 28 Pac. 969. A party asked his witness a certain question, to which the other party objected. The objection was overruled, and immediately upon the answer being given the party asking the question moved to strike it out. It was held that the answer should not be stricken out, because the party asking the question was not entitled to have an unfavorable answer rejected.

FIFTH AND SIXTH ASSIGNMENTS OF ERROR.

The witness Ryan testified that the day before the accident, a conversation took place at Calva, with respect to the crack in the wheel, at which Hall was present. He testified that Hall was within hearing, that he was standing around, when one Regan made certain remarks about the wheel. The witness was unable to state just what distance Hall was from the machine or from the party who made the remark, or whether Hall said anything or not, but that he was near the wheel and could have heard the statements of Regan if he had been listening, that "he was really within hearing." (pp. 42-3, fol. 90-1).

The object of the proposed testimony was to show that Hall had notice or knowledge of the existence of the crack and its possible consequences, and hence that he assumed the risk. It is insisted that it was competent for this purpose, and that it was a question for the jury, whether, under all the circumstances, Hall heard the conversation or the remarks of Regan. The facts that the conversation took place at a remote side track, that plaintiff was actually present and could have heard, that the conversation related to a machine which he was using in his daily employment, that it was not shown that any one but the three parties named were present, or that there was anything else to distract him

attention, and the fact that he would naturally listen to a conversation between two of his fellow employes concerning one of the instruments of their employment, justify the inference that he did in fact hear it.

It must be kept in mind that this evidence was not offered for the purpose of proving an admission by conduct, and the rule in such cases does not apply. When it is sought to prove an admission by showing statements of a third party, which called for denial and no denial was made, it is essential to prove that the party both heard and understood the statements, before his silence will be considered an admission or admissible for that purpose. But where the evidence is offered simply for the purpose of proving notice a different rule prevails. The offered evidence was admissible on the same principle that evidence of neighborhood notoriety of a particular matter is admissible to prove notice, though there be no evidence that the person sought to be charged with the notice ever actually heard of it.

Bush vs. McCarty Co., 127 Ga. 308, 56 S. E. 430.

Berry vs. House, 1 Tex. Civ. App. 562, 21 S. W. 711;

Wright vs. Stewart, 130 Fed. 905.

The principle upon which the admissibility of evidence as to neighborhood notoriety is based is found in the probability that the party would have heard of a fact which was notorious in his neighborhood. This does not mean that such person actually did know of such fact, but the notoriousness of it is deemed in law sufficient to warrant the submission by the court to the jury of the question as to whether such person ever did actually hear of such fact. On the same principle, proof of a conversation had in the presence of a party is admissible for the purpose of showing notice to such party. It is not necessary in order that the purport of such conversation be received in evidence

that the party tendering it go further and prove that the conversation was actually heard and understood by the person to whom notice is imputed.

A different rule, of course, prevails where it is sought to show an admission by silence. The extent of this rule is thus stated in

1 Wigmore on Evidence, sec. 261.

"Communication to a husband or wife is always receivable to show probable knowledge by the other * * * because while it is not certain that one will tell the other and while the probability is less upon some subjects than upon others, still, there is always some probability—which is all that can be fairly asked for admissibility."

It cannot be said that there was no probability that Hall heard the conversation in question. Whether he did or not under the circumstances disclosed by the evidence, was a question of fact, and the jury should have been allowed to determine it.

There is shown in this case, at least a reasonable probability that the plaintiff heard the statements. The question whether he did hear them, should have been submitted to the jury, with an instruction that if believed he did hear them, they might take that fact into consideration in determining whether he knew the condition of the wheel and the effect of using it in that condition. The jury, it is true, might not have found that he heard, but the circumstances were sufficient to justify them in inferring that he did. It was error, therefore, to wholly exclude the evidence, and deprive the defendant of the right to have the jury pass upon the question whether the plaintiff did hear the conversation or not.

EIGHTH AND NINTH ASSIGNMENTS OF ERROR.

Near the close of the taking of testimony, the court of its own motion, called C. C. Mallard as a witness, and examined him as to the effect of the motion of the car when going around a curve of the character shown by the evidence, and he gave evidence favorable to the defendant. Naturally, counsel for the defendant at once withdrew his objection (P. 59, fol. 131). The court, subsequently, of its own motion, struck out the testimony of this witness, and instructed the jury to disregard it.

The course adopted by the court, though unusual, especially when both parties objected, was proper. The court may call and examine a witness who has not been called by the parties, if he deems such course to be in furtherance of justice.

8 Enc. Pl. & Pr. 72.

The evidence given by the witness was competent and material. It was cumulative, but that was no reason for excluding it.

3 Enc. of Evidence, 929, and note 39.

Barhyte vs. Summers, 68 Mich. 34, 36 N. W. 93.

South Danville vs. Jacobs, 42 Ill. App. 533.

Once in the record, the evidence of this witness stood in the same position as that of any other, and unless there was some legal reason for excluding it, it should have remained. No such reason is apparent. The plaintiff's motion to strike it out was based solely on the ground that the witness was not called by either party but this was denied. The evidence being in the record, no matter how it got here, and being proper in itself, it was error to strike it out and instruct the jury not to consider it.

THE ERROR OF THE COURT IN STRIKING OUT THE EVIDENCE OF MALLARD WAS HIGHLY PREJUDICIAL.

We regard the action of the court in calling Mallard and then striking out his testimony as grossly prejudicial.

Mallard, as appears in his evidence which was stricken out, was superintendent for the defendant corporation. It was to the effect that under the conditions existing at the time of the accident "the right hand wheel would fling the outer rail." (P. 58, fol. 231). This fact was the foundation of defendant's entire defense and contention. Without giving any reasons whatever, and immediately before giving his instructions to the jury, and on the motion of nobody, the court made this one statement:

"All testimony of Mr. Mallard is stricken from the record." (P. 59, fol. 232).

The prejudicial effect of this statement by the court under such circumstances cannot be exaggerated. It was undoubtedly understood by the twelve jurors as meaning that the court regarded the contention of the defendant with respect to the effect of centrifugal force as being of no consequence. Toward the conclusion of his instructions to the jury, the court said:

"At the conclusion of the taking of testimony the testimony of Mr. Mallard was ordered stricken from the record. You will entirely disregard in your considerations those portions of the testimony which after having been given, were ordered stricken from the record." (P. 63, fol. 141).

Again, the court failed to explain to the jury why this evidence was stricken out and left it to the jury to puzzle out for themselves the effect of his order and instructions.

We submit that this one assignment of error is of itself sufficient to entitle plaintiff in error to a reversal.

ERRORS IN THE GIVING AND REFUSAL OF INSTRUCTIONS.

INSTRUCTIONS AS TO THE ASSUMPTION OF RISK.

The court, by an instruction purporting to define the doctrine of assumption of risk, limited the application of this doctrine to those defects of which the plaintiff had actual knowledge. (Assignment of error 12). In another instruction the court told the jury that upon this question the true test is not whether the employe exercised ordinary care to discover dangers, but whether the defect was known or plainly observable. The defendant requested instructions to the effect that the plaintiff assumed the risk of injury from defects which he knew or by the exercise of ordinary care might have known, or which he had opportunity to know. These instructions, the court refused to give.

Nothing in the other instructions modified or affected the instructions given by the court of which complaint is made by the assignments of error above mentioned. The result of the court's instructions was that the doctrine of assumption of risk was limited to those cases where the plaintiff actually knew the defects, or where they were so plain that without the exercise of any care at all he could not help observing them. The view that the plaintiff assumed the risk of injury from defects which he might have known by the exercise of ordinary care in the course of his employment, or which he had opportunity to know, was entirely eliminated, and, indeed, the court positively instructed the jury that there was no duty resting on the plaintiff to exercise ordinary care to discover defects.

There are few questions upon which there is such an abundance of authority as upon this question of assumption of risk. The cases are almost innumerable, and no attempt

will be made to cite all or even any considerable portion of these. From them, however, may be deduced certain rules which have become firmly established in the law of master and servant. Those pertinent here are:

"Where he (the servant) knows, *or in the exercise of reasonable and ordinary care should know*, the risks to which he is exposed, he will as a rule be held to have assumed them."

26 Cyc. 1196, and cases cited in note 99.

"A servant assumes not only such risks as, from the nature of the business as ordinarily conducted, he must have known, but *also those which the exercise of his opportunities for inspection would have disclosed to him.*"

26 Cyc. 1204, and cases cited in note 17.

In Thomas vs. Missouri Pacific Ry. Co., 109 Mo. 187, 18 S. W. 980, it is said, quoting with approval from 2 Thompson on Negligence, 1008:

"If the servant, before he enters the service knows, or if he afterwards discovers, or if *by the exercise of ordinary observation or reasonable skill and diligence in his department he may discover*, that the building, premises, appliances or fellow servant, in connection with which or with whom he is to labor, is unsafe or unfit in any particular, and if, notwithstanding such knowledge, or means of knowledge, he voluntarily enters into or continues in the employment without objection or complaint, he is deemed to assume the risk of the danger thus known or discoverable, and to waive any claim for damages against the master in case it shall result in injury to him."

H. & T. C. R. Co. vs. Fowler, 56 Tex. 45.

Larson vs. St. P. M. & M. R. Co., 43 Minn. 423, 45 N. W. 722.

Ragon vs. Ry. Co., 97 Mich. 265, 56 N. W. 612.

In Perigo vs. C. R. I. & P. Ry. Co., 52 Iowa 276, 3 N. W. 43, the refusal of the following instruction was held to be reversible error:

"If you believe from the evidence in this case, that the proximity of said coal platform to the track and to cars as they passed was plain and apparent, and the liability to injury therefrom manifest, and that deceased knew of such proximity, *or by the exercise of ordinary care to avoid injury to himself might have known*, and with such knowledge, *or opportunity of knowledge*, remained in the defendant's employ, and continued to work in the vicinity thereof without objection or protest, and without promise of amendment, then plaintiff cannot recover in this action."

In Evansville & R. R. Co. vs. Henderson, 134 Ind. 636, 33 N. E. 1021, it is said:

"This waiver includes, on the part of the servant, all such risks, as from the nature of the business, as usually and ordinarily conducted he must have known when he embarked in the master's service and also those risks which the exercise of his opportunities for inspection while giving diligent attention to such serivce would have disclosed to him."

In Linton Coal and Mining Co. vs. Parsons, 15 Ind. App. 69, 43 N. E. 651, it is said:

"And, when it is said that the servant assumes the risk of dangers of which he has knowledge, it is not meant that he assumes no risks except from dangers of which he has actual knowledge, or which are patent, for he does assume the risk of latent as well as patent dangers, which are a natural incident of the service, and which it is not the duty of the master to guard against; that is, dangers, whether visible or invisible, known or unknown, at the time of the employment, if they are such as naturally arise from the nature of the work to be performed, he assumes. It is

for this reason that he is required to exercise reasonable care to ascertain and know of dangers which may exist or even arise suddenly, and confront him during his service."

The above are but a few of the many cases that might be cited. They will be found collated in the notes to 26 Cyc. above cited.

The charge of the court eliminated a recognized element of the doctrine of assumption of risk. The duty of the employe to exercise ordinary care to discover dangers, and to avail himself of his opportunities for making such discovery is as well settled as the doctrine itself. It is submitted that when the court thus modified the recognized doctrine, and refused to give instructions containing the omitted elements, it committed error which is fatal to the judgment.

THIRTEENTH ASSIGNMENT OF ERROR.

The requested instruction made the basis of this assignment of error was to the effect that the plaintiff must show, by a preponderance of the evidence that the condition of the wheel and that alone caused the accident. There was evidence strongly tending to show other causes for the accident. Such other causes were not within the negligence alleged in the complaint. The defendant was clearly entitled to instructions that the alleged negligence must be shown to have been the cause of the accident, or the plaintiff could not prevail.

The court did instruct the jury that the burden of proof was upon the plaintiff to establish that the accident was caused by the defects complained of, and that if they found that the cause of the accident was not disclosed by the evidence, they should find for the defendant, but there was no positive instructions that if they believed something other than the negligence alleged was the cause of the ac-

cident, they must find for the defendant. It is probable that if the defendant had not requested these instructions, those given by the court would be considered sufficient, on the theory that if counsel feared that the instructions of the court were not sufficiently clear, such instructions as were desired should have been requested. But here counsel did request specific instructions, and it is submitted that their equivalent was not given.

PREJUDICE

The jury brought in a verdict for $10,000. During the pendency of defendant's motion for a new trial, the plaintiff voluntarily remitted $5000 of the verdict, whereupon the motion for a new trial was overruled.

Before the Supreme Court of the Territory it was argued by the appellant that the voluntary remitting of so large an amount by the plaintiff was an admission that the verdict was excessive. It was further argued that an excessive verdict may not be cured by a remitter of the excessive portion of the verdict, where the amount of damages cannot be measured by any fixed standard or determined with certainty.

It is held by many courts that the rendering of an excessive verdict in such a case is indicative of prejudice by the jury and that the effect of such prejudice would have been to cause the jury not only to render an excessive verdict, but to render a verdict against a party where under the law and evidence the verdict should have been in such party's favor. That the vice of the prejudice goes to the entire verdict; and such prejudice being established by the fact of the excessive verdict, should require a reversal by the appellate court. We admit that some courts have adopted a contrary rule.

The minute entries show that this case was tried in the month of December, 1907.

In March, 1905, the Supreme Court of the Territory of Arizona, in the case of Southern Pacific Company vs. Fitchett, 9 Az., 128, after an extensive review of the authorities on both sides of this proposition resolved this question so far as Arizona was concerned, by holding that it was not the province of the court to substitute for the verdict of a jury its own estimate of damages, and that where the jury's verdict is ascertained to be excessive, a reversal becomes necessary.

Such decision established the law of Arizona, and such was the law of Arizona when the verdict was rendered in the Hall case, and when the trial court denied defendant's motion for a new trial. Upon the appeal to the Supreme Court of the Territory, appellant—plaintiff in error here—assigned as error the failure of the district court to grant a new trial upon the ground of prejudice evidenced by such excessive verdict, and in its brief cited in support of such assignment of error the case of Southern Pacific vs. Fitchett.

To our amazement the Supreme Court of the Territory disposed of our contention in the following summary language:

"We are not now prepared to adhere to the views so expressed." (Referring to the opinion in Southern Pacific Co| vs. Fitchell).

We are aware that this court in passing upon a question of this character in which courts of the different states have been in conflict, adopt for each particular case the law as laid down by the state where the litigation took place.

We respectfully submit, however, that the district court under the law as it then stood erred in denying defendant's motion for a new trial, and that the effect of the excessive verdict by the jury and of the overruling by the Supreme Court of the Territory in this case of so recent a decision, evinced the existence of a prejudice against the Gila Valley Railroad on the part of both jury and court, which, in conjunction with the other circumstances of the case and the assignments of error, entitle the plaintiff in error to a reversal of the judgment.

EUGENE S. IVES,
Attorney for the plaintiff in error.

31

FILED
NOV 12 1913
JAMES D. MAHER
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1913.

No. 68.

GILA VALLEY, GLOBE & NORTHERN RAILWAY COMPANY, M. P. FREEMAN, and M. P. FREEMAN and FRANK H. HEREFORD, EXECUTORS OF H. B. TENNEY, DECEASED, *Plaintiffs in Error,*

vs.

JOHN HALL.

IN ERROR TO THE SUPREME COURT OF THE TERRITORY OF ARIZONA.

BRIEF FOR DEFENDANT IN ERROR.

E. H. THOMAS,
Attorney for Defendant in Error.

[redacted]

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1913.

No. 68.

GILA VALLEY, GLOBE & NORTHERN RAILWAY COMPANY, M. P. FREEMAN, and M. P. FREEMAN and FRANK H. HEREFORD, EXECUTORS OF H. B. TENNEY, DECEASED, *Plaintiffs in Error,*

vs.

JOHN HALL.

IN ERROR TO THE SUPREME COURT OF THE TERRITORY OF ARIZONA.

BRIEF FOR DEFENDANT IN ERROR.

ARGUMENT.

The evidence was sufficient to sustain the verdict, and, therefore, the judgment should be affirmed.

In Texas & Pacific Railway Company v. Harvey, 228 U. S., at page 325, it is said:

> "The Appellate Court is not a jury for the trial of a case, nor do we have the powers of a court to grant a new trial, which, in the Federal practice, is a matter resting in the sound discretion of the trial court."

Concisely this case was submitted to a jury on the question whether the derailment of the car or velocipede, supplied by the plaintiff in error for the use of the defendant in error, was caused wholly by its defective condition. The jury by its verdict answered this question in the affirmative; that verdict was confirmed by the judgment of the trial judge who saw and heard the witnesses, and saw the exhibits, and affirmed by the Supreme Court of the Territory of Arizona, which states in its opinion (R. 70):

> "A careful consideration of the whole record convinces us that the jury was warranted in finding that the accident resulted from the defective wheel."

It is further said in Texas & Pacific Railway Company v. Harvey, page 324, *supra*:

> "Where there is uncertainty as to the existence of negligence or contributory negligence, whether such uncertainty arises from a conflict of testimony, or because, the facts being undisputed, fairminded men might honestly draw different conclusions therefrom, the question is not one of law. Richmond & D. R. Co. v. Powers, 149 U. S., 43, 45, and cases there cited."

The complaint sufficiently stated a cause of action and no exception for variance between allegation and proof appears in the record. (See exception of plaintiff in error, Record, p. 59, and prayers offered in its behalf, Record, pp. 64 to 66, inc.)

(a) *The jury had before them the question whether the use of this wheel was dangerous and there was evidence tending to show it was dangerous to use the wheel.*

Printy says it was dangerous to run except at low speed. (R., 30.) He further testifies (R., 37):

"The flange is bulged out in one place and that might be liable to throw the car off the track."

Medler testifies in reference to the car, that it was in a "very bad condition" (R., 32). Referring to the third wheel he says on the inside there is a crack at least 2 inches long.

"It looks like the inside of the flange is cut in different places so that it is very rough and it would have a tendency for a person to look at it to show hard and soft places in the wheel."

The witness is referring to the inside of the flange that rides inside of the rail when the car is on the track. That is the part that runs next to the rail. Upon being asked whether in his opinion the wheel would be dangerous for the purposes of transporting men upon, he says:

"I would not ride on it at all." That is dangerous for such purpose. (R., 32.)

Greer testifies in reference to the third wheel:

"I consider the condition of that wheel very bad. It had a crack in the face of it and the flange had three cut places in it. The crack was about 2½ inches long, and goes clear through the tire. The tread of the wheel did not seem to be worn to any extent. The flange was worn in three places that I noticed. It seemed to be cut in, looked a good deal as if it had been cut with a hard instrument like it might have been gouged out with a file. I think there is three gouged out places there in the wheel; on the edge of the flange and on other places on the part of the flange that rides next to the wheel." (R., 35.)

The witnesses for the plaintiff in error state as follows: Ryan testified:

"Q. Now, would you say as an expert that if there were notches and indentations and gouges in that third wheel that it would contribute to the wheel jumping the rail? * * *

A. Yes, sir."

This witness also testified that running the car the ordinary way in which it would be put to ordinary use in transporting men to and from work, that work being the setting of mile-posts (which was the work the defendant in error was engaged in at the time of the accident), the third wheel was not a safe wheel. (R., bottom of page 44.) The witness qualifies this statement on redirect examination as referring to the running of the car by an ordinary person. (R., 47.)

Dodge testified (R., 48):

"In my opinion that wheel attached to a machine running around a curve with a radius of not less than 1100 feet at a speed not to exceed 12 miles an hour is safe. It would be safe for me at any rate of speed. I might be considered as an operator of skill."

On cross-examination the witness stated (R., 50):

"It is not beyond a physical possibility for a three-wheeled gasoline car with a wheel like that of defendant's Exhibit 1 to be derailed as it is going around a curve and off on a tangent."

The witness further says that he does not know that he can be classed as an expert. Witness further testified on cross-examination that if the wheel were a good wheel there would be no cracks where it presents a surface to the rail and no indentations. He says:

"I still consider that particular wheel a safe wheel notwithstanding it might have indentations and cracks and not present a sharp edge to the rail." (R., 51.)

Callen testified (R., 57):

"That wheel, noticing the worn portions of the flange and the crack in the flange, I would consider safe going around a curve not to exceed ten or twelve miles an hour."

On cross-examination this witness stated that it would make no difference if "there was no flange on that wheel going around that curve."

"When the machine left the curve and entered on a tangent it would make a difference. Then you would need a flange. You want a safe flange. I would call that a safe flange." (R., 58.)

Counsel for plaintiff in error in his brief (page 5), admits the defective condition of the flange of the third or pony wheel. Counsel says:

"It follows, therefore, that the judgment must be reversed upon the ground that there was no evidence to sustain the verdict, *unless such evidence be found in the proof of the defective condition of the flange.*"

Again, counsel says (bottom of page 9):

"A flange when called upon to do service, if defective, may fail to render it, and an accident by reason of the failure of the flange to render service could in such case properly be said to have been caused by the defective flange."

(b) *The flange was defective, and the plaintiff in error had actual and constructive notice of the defective condition of the car prior to the accident.*

Ryan was an employee of the plaintiff railroad for about a year prior to the accident as transit and instrument man (R., 26), and "The general duties of my employment (he says) were to start out with this motor car to locate mile posts" along the railroad (R., 26). When called by the plaintiff in error this witness testified that he "noticed the alleged defect in this wheel the day before the accident" (R., 42). On cross-examination the witness says:

> "From the day before until after the accident when I had occasion to look at it, I had not looked at the wheel at all for the purpose of determining how the adjustment (of the flange) was." (R., 44.)

On redirect examination the witness said:

> "The adjustment of this wheel is just as essential as any *part of the wheel.*" (R., 47.)

The witness testified on direct examination that the wheel "was adjusted so that the flange would be away from the rail toward the inside of the center of the track in front. The way you would run it to the flange would be toward the rail behind." (R., 43.) He says the adjustment could not have been disarranged *very much* between the two days (R., 44), and, also, that the purpose of the adjustment "was that the flange would be away from the wheel in front when the car was going forward, so as to keep it from climbing the rail" (R., 45). He had used "that car off and on for about ten months and it was always adjusted that way to keep it from climbing the rail" (R., 45). There wasn't two inches between the forward part of the flange and the rail.

(Dodge says a half an inch on a straight track (R., 51).) *It would be possible for the flange of the wheel, with that adjustment on that day, to touch the rail"* (R., 45). Dodge, machinist, called by the plaintiff railroad, also testified: "It is not beyond a physical possibility for a three-wheel gasoline car with a wheel like that of defendant's Exhibit 1, to be derailed as it is going around a curve and off on a tangent" (R., 50). He testified that the same machine had left the track twice before (R., 50, 51).

> "The car was adjusted as I said the day before, so that the flange would *most touch* the rail when the car was running" (R., 46). *"If that wheel was adjusted on that day, as I have testified, this part of the flange* (indicating) *would touch the rail."*

"This adjustment was made over a year before the trial (or five or six months before the accident) (R., 51). The wheels are set with one-eighth lead, so as always to keep them away from the rail if possible" (Dodge, R., 52). "All depends on the gauge of the wheel and it depends on the lateral motion you had between the rails" (Dodge, R., 52). Witness used his eye to determine the leeway of an eighth to a quarter of an inch (R., 52) when he made the adjustment. Dodge says if the inside portion strike the top of the rail going forward, in certain places it would climb the rail, then again it would not (R., 53, 54).

Evidence of the generally worn condition of this wheel was relevant.

This worn condition was notice to the employer that the wheel demanded attention. It is thus described by the witnesses for the defendant in error.

For the defendant in error it was testified (Ryan, who was the operator of the car, R., 27):

> "The flange was *worn* inwardly toward the outside of the wheel. That particular flange which when next to the rail was curved; in the tread of that wheel there was a crack about 2 inches or 3 inches long."

Medler speaks of the worn places in the wheel (R., 33). Printy (R., 29) says:

> "The third wheel of that car is a *worn* wheel * * * The side of the wheel was *worn*. The side I refer to as having been *worn* is the inside of the whole of the flange."

The testimony of Greer and other evidence of the worn condition of the wheel has previously been referred to.

(c) *The situation and condition of the car immediately at the time of accident shows that the proximate cause of injury was the defective wheel as no other intervening cause is shown.*

> "The true rule is, that what is the proximate cause of an injury is ordinarily a question for the jury. It is not a question of science or of legal knowledge. It is to be determined as a fact, in view of the circumstances of fact attending it."
>
> Milwaukee & St. Paul Ry. Co. v. Kellogg, 94 U. S., 469; Choctaw, O. & G. R. Co. v. Holloway, 191 U. S., 334, 339.

Two persons were traveling on the car and were present at the happening of the accident; Ryan, the operator of the car, and the defendant in error. The effect of their evidence was a matter for the determination of the jury, and, in any event, the evidence of these witnesses did not ex-

clude a reasonable inference that the car left the track at a point where there was substantially no curvature.

The defendant in error testified (R., 22):

> "This gasoline velocipede was running at the time it left the track as I have testified, about eight or ten miles an hour. This car jumped the track, as we were *coming off the curve* on a tangent right hand curve. We were *coming off* a curve."

Here the witness drew a chart to *illustrate* his testimony (R., 62).

The chart is not drawn to a scale nor is it a mathematical representation of the curve. It is plain the witness could not have made a proper mechanical drawing of the curve.

> "The accident occurred as we were leaving the curve and running upon a tangent, just before we left the curve. I understand as a tangent a piece of straight track."

Ryan testified (R., 27):

> "At the point where the gasoline car left the track, the *situation of the road* with reference to being curved or tangent, *was just coming off a curve*, a right hand curve, and going on a tangent. *The car was just going off a right hand curve when the accident occurred.* The car went off the left hand side of the curve going north."

The appellate court says, in its opinion (R., 70), in this connection:

> "It is argued by counsel for appellee, with much show of reason and supported by testimony of expert witnesses, that in leaving the curve the car was thrown against the left-hand rail and that the flange of the small wheel, because of its defects, failed to perform its functions."

Priaty, a witness for defendant in error, testified (R., bottom of page 29) that the inside of the flange of the third or pony wheel presented in his opinion "gouges to the rail," that unless the operator understood the motion of the car on the track "the bulge in the wheel might throw it off" (R., 30). Medler, a witness for the defendant in error, testified (R., 32, 33):

> "A car going at that rate of speed, ten or twelve miles an hour, in the condition of that wheel in front being worn thin in that manner it is bound to bounce and leave the track owing to the lightness of that part of the machine. Owing to the condition of that wheel going at that rate of speed, the *worn* places on that wheel would cause this wheel to bounce and leave the track. The worn places on the wheel being thin, it would cause this wheel to bounce and leave the track."

He further testified "that *the car* under those conditions *would be bound to bounce and leave the track*" (R., 33).

Greer, a witness for the defendant in error, testified (R., 35) that the car "would be liable to jump the track; that pony wheel would be liable to mount the track and go off on the pony wheel side."

Hence is given a car that had not been inspected; a flange on that car that had not been adjusted for five or six months; evidence that its use was dangerous because of defects in the third wheel; that these defects would cause the car to leave the track when traveling at the rate of speed described in the evidence; that at the time of accident it was coming off a curve; that the curve at the place of accident was only a nominal one; that the car while traveling north left the track on the left side of the track; and that there was no obstruction on the track to cause the derailment.

It is clear, it would seem from the evidence that the reasonable and fair inference is that the defect in the wheel caused the accident.

Counsel for plaintiff in error in his brief (page 10) says:

> "Two salient facts stand forth uncontradicted and undeniable.
>
> 1. That at the time of the accident, the car was being impelled by centrifugal force to the right; and
>
> 2. That the car was thrown to the left.
>
> These two facts are logically inconsistent with the absence of some third force. As to what that force consisted of, there is no evidence, but its existence is a mathematical corollary from such two admitted facts."

The existence of the forces of nature are, of course, admitted, but the application made to the evidence in this case is denied.

The car was traveling slowly from eight to ten miles an hour or about a mile in six or a little over seven minutes. Slower than the travel allowed on a city street. The only witness who knew the curvature of the circle was Ryan. He testified (R., 41) that its radius was about 1900 feet, and properly says "The greater the radius, the lesser the curve." The diameter of the circle was, therefore, 3800 feet with a circumference of about 2¼ miles; and if it be assumed that the car was ten feet long, and that its rear was just leaving the circle the curvature at the front would be less than 1/3 of an inch. At the time of the accident the car was, therefore, practically traveling on a straight line and in a position where the defective flange could and did impinge on the rail and cause the car to climb the rail as the witnesses say. When the car left the rail some one or more of its wheels (it is fair to assume by reason of the force of gravity) struck the roadbed with the result that the car was thrown to the left. The proximate cause, therefore, was the defective wheel.

Circumstantial evidence warranted the submission to the jury. In Chocotaw, O. & G. R. Co., 191 U. S., 64, there was no eyewitness to the injury of the employee.

The Errors Assigned on the Admission and Rejection of Evidence.

First Assignment of Error. The Evidence of Medler That the Car Was in a Very Bad Condition (R., 32).

This witness was a gasoline engineer and had examined the car. He was asked the general question: "Q. What is the condition in reference to it being in repair or out of condition?" and answered without objection. *After he had answered the question* a motion was made to strike out his answer. The granting of such a motion is in the discretion of the trial court. The first ground of objection was that the witness should give specific testimony, and this he immediately proceeded to do. The second ground was that the general condition of the car is not pleaded but, by reference to the complaint, it will be seen that its allegations were both general and specific.

Second and Third Assignments of Error. Whether if the Operator Had Used Due Practical Precaution or Reasonable Precaution the Car Would Have Jumped the Track (R., 34).

The court says: "We shall consider the assignments of error in the order in which they have been argued by counsel" (Opinion, R., 69), but it does not mention these assignments nor several of the other assignments of error on questions of evidence. The objection to one was that the witness was not qualified to give his opinion on the subject and to the other that it called for a conclusion of law. It

was within the province of the trial court to determine the qualification of this expert. The questions referred, however, to any one operating such a car, not to a qualified operator, and were not germane to the issue.

Fourth Assignment of Error. Striking Out the Answer of Greer That the Least Bit of an Obstruction Like a Stick, etc., Would Cause the Car to Jump the Track (R., 35, 36).

This evidence was wholly inadmissible. No such intervening cause existed, as is admitted. The evidence was calculated to mislead and confuse the jury. It is evident that counsel for defendant in error were inquiring of the witness about the condition of the wheel and that the witness' answer was not responsive to the question. Counsel therefore had the right to ask the court to strike out the answer of the witness.

Fifth and Sixth Assignments of Error.

Ryan testified that he noticed the alleged defect the day before the accident, and that Hall (the defendant in error), Regna and somebody else were present (R., 42). The witness testified: "I remember a conversation that was had at that time within the hearing of Mr. Hall"; that Mr. Regna made the remark and he was right near the velocipede; that he could not state whether Hall was right next to it or off on one side; that he did not know how far Hall was away from Mr. Regna at the time the remark was made; he was not twenty yards away and he could have heard it *if he had been listening;* he was really within hearing. The witness was asked to state as near as he could the substance of such conversation, but the answer was not allowed.

The following offer was made:

> "Mr. Ives: I offer to prove by this witness that at the time a conversation occurred at which this alleged defect and its probable effect was discussed" (R., 43).

The offer does not state that the defect would have caused the derailment of the car. What the evidence would have been is not disclosed. It might have been that the defect if in the flange made no difference whatever. In fact Ryan testified (R., 43):

> "I do not think the defect was of such a character to cause derailment if the operator of the machine understood how to operate it."

It is unlikely that he was about to detail a statement by Regna to the contrary, all the more so because the railroad company was contending and is contending that the defect, particularly the crack, did not cause the derailment. The offer was evasive and misleading.

Counsel say (Brief, page 17):

> "The object of the testimony was to show that Hall had notice or knowledge of the existence of this crack" (not in the flange but in wheel) "and its possible consequences, and hence that he assumed the risk."

Here is an inconsistent position which counsel is estopped to take unless he abandons the claim that there is no evidence that the defect in the flange caused the accident.

Again, as the defendant in error is not shown to have heard what Regna said, the proposed evidence was pure hearsay. Regna was not called as a witness to say what he observed, and as the defendant in error is not shown to have heard the statement it is futile to claim that he thereby had notice or knowledge of anything. (See opinion of

the court, R., 71.) 1 Wigmore, Sec. 261, on communications to a husband and wife is cited, but Hall and Ryan did not sustain that relation. The author says, however:

> *"Express communication* is always a proper mode of evidencing knowledge or belief."

It is believed that no ground exists even for a plausible claim of prejudicial error on this assignment.

Eighth and Ninth Assignments of Error (R., 58).

No exception was reserved by the plaintiff in error to the ruling of the court in its order that "all testimony of Mr. Mallard is stricken from the record" (R., 59). Two exceptions were taken by the plaintiff in error to the action of the court in calling the witness (R., 58). Later these objections were withdrawn (R., 59), but at the conclusion immediately following the court's order striking the testimony out, the only exception is the following:

> *"Mr. Ives: I take exception to the refusal of the court to give instructions to the jury as requested by the defendant"* (R., 59).

The instructions are silent on this subject. The only fact the witness testified to, however, was, in substance, that the right-hand wheels *of a car* would hug the outer rail at a speed of eight miles an hour on a left curve; that is to say, a car that was on a curve. The witnesses generally and the court speak of this car, and of this curve as a right-hand curve (Opinion, R., 70). This evidence was not material to the issue. It was not definite and certain.

Errors in Giving and Refusing Instructions.

Assumption of Risk.

The defendant in error was "not skilled in any branch of labor or profession." He was employed as chainman at $65 per month (R., 21), and never had any experience whatever in operating any machine (R., 22). Covering a period of four days he had used this gasoline engine but fourteen hours (R., 23). When he was employed he was simply told "to go down and work on the car with the boys" (R., 24).

The common law rule is thus stated by this court in Texas & Pacific Railway Company v. Harvey, 228 U. S., 319, 321:

> "At the common law a servant assumes the ordinary risks of his employment, but he is not obliged to pass upon the methods chosen by his employer in discharging the latter's duty to provide suitable appliances and a safe place to work, and he does not assume the risk of the employer's negligence in performing such duty. This rule is subject to the exception that, where a defect is known to the employee, or is so patent as to be readily observed by him, he cannot continue to use the defective appliance, in the face of the knowledge and without objection, without himself assuming the hazard incident to such a situation. If a defect is so plainly observable that the servant may be presumed to know its existence, and he continues in the master's employment without objection, he is said to have made his election to thus continue, notwithstanding the master's neglect, and in such a case he cannot recover. Choctaw, O. & G. R. Co. v. McDade, 191 U. S., 64; Schlemmer v. Buffalo, R. & P. R. Co., 220 U. S., 590, 596, 600."

In Texas & P. R. Co. v. Archibald, 170 U. S., 665, the duty of the servant to "exercise ordinary care" to discover defects is expresely denied.

In Choctaw, O. & G. R. Co. v. McDade, 191 U. S., 64, it was held to be negligence as a matter of law for a railroad company to maintain an iron spout so attached to a water tank as to be a constant menace to the lives and limbs of brakemen on its trains, where it might readily have been constructed and hung so as to be safe.

It was further held that an employee assumes the risk of injury from defective appliances furnished by his employer *only when the defect is known to, or plainly observable by, the employee.*

Schlemmer v. Buffalo, R. & P. R. Co., 220 U. S., at page 596, is to the same effect.

These cases establish the rule laid down by the trial and appellate courts in this case, and emphasize the doctrine that the servant has the right to assume that the master has used due diligence to provide suitable appliances in the operations of his business, and he does not assume the risk of the employer's negligence in performing such duties. Besides, in view of the ignorance of the employee, in the case at bar, it was the duty of the master to have instructed the servant of any dangers that were not plainly observable or obvious. There are no facts in the case calling for a submission to the jury of the question whether the employee exercised ordinary care to discover other danger in the use of the car. The rule in Arizona is stated in the opinion (R., 70):

> "Appellant contends that the court erred in its instructions in stating the rule of assumption of risk by an employee in that it limited the defects, the risk of injury from which the plaintiff assumed, to those he actually knew or those which were plainly observable

to him, and insists that an employee also assumes the risk of those he might or ought to have known through ordinary care. There are authorities which support this contention, *but the question is determined to the contrary by our appellate court.*"

Thirteenth Assignment of Error.

The court (R., 59) instructed the jury:

"The burden is upon the plaintiff to make out his case by a preponderance of the evidence";

and also,

"The burden of proof is upon the plaintiff to establish all of the material allegations in the complaint, which are not admitted in the answer of the defendant, and that in order that the plaintiff may recover in this action, he must prove not only that there was a defect in the wheel of such a character as to make the machine of which the wheel was a part, unsafe, but also that the particular accident in which the plaintiff was injured was caused by such defect."

"You are instructed that the fact that the condition of the wheel in evidence rendered the machine unsafe, if proved by a preponderance of the testimony, does not raise any presumption that the accident was occasioned by such defect."

"If you believe from a preponderance of the evidence that the flange of the wheel and the crack in such wheel were by reason of centrifugal force impelled away from the rail upon which said wheel was running at the time of the accident, so neither such flange or crack could have been touching the rail at the time of the accident, then you are instructed that the accident was not occasioned by the defect alleged in the complaint, and the verdict must be for the defendant."

The instructions proceed in the same tenor limiting the liability solely to the defect in the wheel and leaving the jury to infer that the accident might have happened from any one or all of the causes insisted upon by the plaintiff in error. The charge in this respect was strongly in favor of the plaintiff in error.

The Remittitur.

The remittitur of counsel for defendant in error (R., 5) cites sections 1450 and 1451, R. S. of Arizona.

Sec. 1450 provides: "Any party * * * may remit any part of such verdict or judgment."

Sec. 1455: "A remitter or correction made as provided in any of the preceding sections shall, from the making thereof, cure any error in the verdict or judgment by reason of such excess."

The order of the court denying motion for new trial recites the remittitur. The presumption of law is, that the trial court determined that the verdict was not the result of passion or prejudice and such determination was found by the appellate court. Passion or prejudice are therefore eliminated and the question is resolved into one of power of the court to order the remittitur. The authorities show that the court possessed this power, and hence no error has resulted. Substantial justice has been done. The injuries were severe, painful, and permanent and the leg is shortened two inches (R., 23, 38, 39, 40, and Ex. B, 64). The injured man has a life expectation of over 31 years (R., 40). Ten thousand dollars was not an extraordinary verdict for such an injury.

In Railroad Company v. Herbert, 116 U. S., 642, a remittitur of $15,000 on a verdict of $25,000, in a personal injury case, was directed by the trial court, and it was held that such matter was in the discretion of the court. This court said:

"In requiring the remission of what was deemed excessive it did nothing more than require the relinquishment of so much of the damages as, in its opinion, the jury had properly awarded it. The corrected verdict could therefore, be properly allowed to stand."

This case was affirmed in Arkansas V. L. & C. Co. v. Mann, 130 U. S., 69, and it was also held that this court is not authorized to assume, from the mere fact that a large sum was remitted, that the court below believed that the jury were governed by prejudice or wilfully disregarded the evidence.

It being apparent that no prejudicial error exists in the record, it is believed that the judgment should be affirmed.

Respectfully submitted,

E. H. THOMAS,
Attorney for Defendant in Error.

BAKER & BAKER,
BRITTON & GRAY,
of Counsel.

GILA VALLEY, GLOBE & NORTHERN RAILWAY COMPANY *v.* HALL.

ERROR TO THE SUPREME COURT OF THE TERRITORY OF ARIZONA.

No. 68. Submitted November 13, 1913.—Decided January 5, 1914.

On an appeal from the territorial court this court cannot consider errors, not fundamental in character, which might have been, but were not, brought under review in the appellate court below.

Where the local practice of the Territory requires specific assignments of error and treats all others as waived, and the transcript filed here does not contain the assignment of errors below, this court confines itself to errors mentioned in the opinion of the appellate court below.

Whether an accident did or did not occur in a manner theoretically impossible according to expert opinions of defendant's witnesses, is properly submitted to the jury if there is evidence to sustain the plaintiff's contention, and if the court cannot hold as a conclusion of law that the accident could not possibly have occurred in that manner.

One employed for only a few days, and whose duties did not include inspection of the equipment or care respecting its condition, *held*, not chargeable as matter of law with assumption of risk on the ground of presumed knowledge of a defect in the condition of the equipment, there being no direct evidence that he knew of it.

Where the fact is in dispute as to whether a defect in a machine is such as to render its use dangerous, it cannot be properly held as matter of law that the risk is obvious even to one who knew of the defect.

An employé assumes the risk of dangers normally incident to the occupation in which he voluntarily engages, so far as they are not attributable to the employer's negligence; but the employé has a right to assume that his employer has exercised proper care with respect to providing safe appliances for the work, and is not to be treated as assuming the risk arising from a defect that is attributable to the employer's negligence, until the employé becomes aware of such defect, or unless it is so plainly observable that he may be presumed to have known of it.

In order to charge an employé with the assumption of a risk attributable to a defect due to the employer's negligence it must appear not only that he knew (or is presumed to have known) of the defect, but that

he knew it endangered his safety; or else such danger must have been so obvious that an ordinarily prudent person under the circumstances would have appreciated it.

Questions of admissibility of evidence are for the determination of the trial court, whether its admission depends upon matter of law or of fact, and the finding upon such a question is not subject to reversal on appeal or error if fairly supported by the evidence; and so *held* as to the exclusion of evidence offered by defendant to prove remarks made by a third person in presence of the plaintiff before the injury as to defects in the appliance used by him.

The territorial appellate court having held that while in case of an excessive verdict for unliquidated damages tainted with passion or prejudice a new trial should be granted and the verdict not simply reduced, the trial judge is in the better position to judge if the verdict is merely excessive and should be allowed to stand if voluntarily reduced by the plaintiff to a reasonable amount, this court sees no reason for disturbing that decision, there being no constitutional obstacle to the practice.

13 Arizona, 270, affirmed.

THE facts, which involve the validity of a verdict and judgment for damages for personal injuries obtained in the territorial courts, are stated in the opinion.

Mr. Eugene S. Ives for plaintiffs in error:

In order to justify the court in sending case to the jury the evidence must clearly tend to sustain a verdict for plaintiff. *Root* v. *Fay*, 5 Arizona, 19; *Randall* v. *R. R. Co.*, 109 U. S. 478; *Richardson* v. *Powers*, 11 Arizona, 31.

Where facts proved are equally consistent with the absence of negligence as of its existence, the question should not be submitted to the jury. *McFadden* v. *Campbell*, 34 N. Y. Supp. 136; *Baulec* v. *Railroad Co.*, 59 N. Y. 356.

If the injury may have resulted from one of two causes for only one of which the defendant is liable, plaintiff must show with reasonable certainty that the cause for which the defendant is liable produced the result. *Warner* v. *R. R. Co.*, 178 Missouri, at p. 134; *Pierce* v. *Kile*, 80 Fed. Rep. 865; *Ellison* v. *Truesdale*, 49 Minnesota, 240.

A verdict based on conjecture will not be permitted. *Wheelan* v. *Railway Co.*, 85 Iowa, 167; *B. & O. R. R.* v. *State*, 71 Maryland, 599; *Cumberland & P. R. Co.* v. *State*, 73 Maryland, 74.

An expert witness in testifying as to the condition of the velocipede which caused the accident must state specific facts and not his conclusion that its condition was very bad. *McMahon* v. *Dubuque*, 107 Iowa, 62.

In cross-examination of an expert witness it is proper to ask the witness if other causes may not have produced the result. 5 Ency. of Evi. 632; *Schlenker* v. *State*, 9 Nebraska, 241.

An answer to a question to which the opposing counsel objected, cannot be stricken out upon motion of the party who propounded it. *Hogan* v. *Shuart*, 11 Montana, 498.

Evidence offered by the defendant as to a conversation which the plaintiff might have heard is admissible, and it is for the jury to determine whether the plaintiff actually overheard such conversation. *Bush* v. *McCarty*, 127 Georgia, 308; *Berry* v. *House*, 1 Tex. Civ. App. 562; *Wright* v. *Stewart*, 130 Fed. Rep. 905; 1 Wigmore on Ev., § 261.

The court may call and examine a witness who has not been called by the parties. 8 Ency. Pl. & Pr. 72.

The fact that evidence is cumulative is no reason for excluding it. 3 Ency. Ev. 929 and note 39; *Barhyte* v. *Summers*, 68 Michigan, 34; *S. Danville* v. *Jacobs*, 42 Ill. App. 533.

Where the servant had the opportunity to know or in the exercise of reasonable or ordinary care should have known the risks to which he is exposed in the course of his employment, he will be held to have assumed them. 26 Cyc. 1196, n. 99; 26 Cyc. 1204, n. 17; *Thomas* v. *Mo. Pac. Ry. Co.*, 109 Missouri, 187; Thompson on Negligence, 1008; *H. & T. C. R. Co.* v. *Fowler*, 56 Texas, 45; *Larson* v. *R. R. Co.*, 43 Minnesota, 423; *Ragon* v. *Ry. Co.*, 97 Michigan, 265; *Perigo* v. *Ry. Co.*, 52 Iowa, 276; *Evansville Ry.*

Co. v. *Henderson*, 134 Indiana, 636; *Linton Coal Co.* v. *Parsons*, 15 Ind. App. 69.

Mr. Edward H. Thomas for defendant in error.

MR. JUSTICE PITNEY delivered the opinion of the court.

This is a review of a judgment of the Supreme Court of Arizona, rendered prior to Statehood, affirming the judgment of one of the territorial district courts, in an action brought by Hall against the Railway Company to recover damages for personal injuries. Hall was in the employ of the Company as chainman, and on April 23, 1907, was engaged, with another employé named Ryan, in measuring distances for locating mile-posts along the line of its railway. For purposes of transportation they used a three-wheeled gasoline car or "velocipede" furnished by the Company. This car had two wheels on the right-hand side, over which were the engine, a seat for the use of the operator, and a seat in front for another person; the third wheel—or "pony wheel," as it was called—was a small wheel on the left-hand side nearly opposite the front wheel on the right-hand side, and fastened to the machine by a bar extending across. The wheels, like the ordinary car wheel, had inside flanges designed to keep the treads of the wheels upon the tracks. On the day mentioned, Hall and Ryan were upon this car traveling upon the line of railway, Ryan operating the machine and Hall sitting in front. While running at a speed of from eight to twelve miles an hour the car suddenly left the track, going to the left, the side on which the "pony wheel" was located. Hall was thrown in front and run over, sustaining severe injuries. The ground relied upon to support a recovery of damages from the employer was that the flange upon the third wheel was worn and cracked in a manner that rendered its use dangerous; that the defect was of such a

character that it would have been discovered in the course of reasonable inspection; and that by reason of this defect the machine left the track. The company denied negligence on its part, set up contributory negligence, and averred that Hall knew or had opportunity to know the condition of the car, and that he assumed the risk of injury resulting from the alleged defect. Upon the trial the jury returned a verdict in his favor for $10,000. The Company moved for a new trial, and, pending this motion, Hall voluntarily remitted $5,000 from the amount of the verdict. Thereafter the trial court denied the motion, and entered judgment in Hall's favor for $5,000 and costs. From this judgment and from the order denying the motion for new trial the Company appealed to the territorial Supreme Court, which affirmed the judgment, as already stated. 13 Arizona, 270.

This writ of error is sued out by the Railway Company and the sureties upon the *supersedeas* bond that was given for the purposes of the appeal to the territorial Supreme Court. A reversal of the judgment is sought because of alleged trial errors.

At the outset we lay aside certain assignments of error filed in this court that are designed to raise various questions which do not appear, from anything in the record before us, to have been presented to the territorial Supreme Court for its consideration. It is inadmissible for this court to consider errors, not fundamental in their character, which might have been but were not brought under review in the appellate court below; for it is that court's judgment which is alone subject to our review. The impropriety of allowing a party, conceiving himself to have suffered from an erroneous ruling of a trial court in a matter not jurisdictional, nor essential to the foundation of the action, but involving a mere matter of procedure, to invoke the judgment of this court thereon, without availing himself of the opportunity for a review

thereof in the appropriate appellate court of the Territory, has been repeatedly pointed out. *Montana Railway Co.* v. *Warren*, 137 U. S. 348, 351; *San Pedro & Cañon Del Agua Co.* v. *United States*, 146 U. S. 120, 136; *Jordan Mining Co.* v. *Société des Mines*, 164 U. S. 261, 264.

The local practice required specific assignments of error, and treated errors not thus assigned as being waived. Arizona Rev. Stat. 1901, pars. 1523 and 1586; Supreme Court Rules 3 and 6; 4 Arizona, ix and xi; 35 Pac. Rep. vi and vii; *Daggs* v. *Phoenix Nat'l Bank*, 5 Arizona, 409, 415; *County of Santa Cruz* v. *Barnes*, 9 Arizona, 42, 49; *Bail* v. *Hartman*, 9 Arizona, 321, 327. The transcript filed here does not contain the assignments of error below, so that there is nothing to show what errors were assigned or relied upon in the territorial Supreme Court, except as they receive particular mention in its opinion. Confining our attention to these, the questions presented are the following:

First, it is contended that the trial court ought to have instructed the jury to return a verdict in favor of the defendant, and this upon the ground that there was no evidence to sustain a recovery, unless it could be found in the proof of the defective condition of the flange of the "pony wheel"; it being at the same time contended to be a physical impossibility that this defect in the flange could have caused the accident. The wheel itself was in evidence as an exhibit, and it was testified that the inside of the flange, where it came next to the rail, was irregularly worn; or, as a witness put it,—"cut in different places so that it is very rough, and it would have a tendency (for a person to look at it) to show hard and soft places in the wheel." This witness declared that this condition of the wheel would cause it to "bounce and leave the track." Another witness testified that there were "three gouged out places" in the flange, and (in effect) that if one of these should strike a protruding joint between rails

"the sharp edge of the flange would mount that rail and go off." It is insisted, however, that by the uncontroverted testimony the car, at the time of the accident, was traveling upon a curve towards the left, and was therefore necessarily impelled by centrifugal force towards the right, so that the defective flange was drawn away from the rail and was performing no function. The theory is that the centrifugal force must have kept the right-hand wheels constantly bearing upon the inside of the outer or right-hand rail, and that therefore in the absence of some extraneous cause, it was impossible for the car to be thrown toward the left. We are unable to say as a conclusion of law, that such a car, while running upon a curve towards the left, at a speed of from eight to twelve miles an hour, and with interior flanges upon the right-hand wheels preventing it from leaving the track on that side, would not be occasionally thrown with a lurch away from the right-hand rail and against the opposite rail, even were the car at the time traveling upon a constant curve. But however this may be, there was evidence from which the jury might reasonably infer that at the point where the car left the track it was just leaving the curve and going upon a tangent. At this point it might naturally be subjected to a lurch that would throw its weight with momentum against the left-hand rail and thus bring into operation the tendency of the "pony wheel" to mount the rail because of the worn condition of the inside of the flange. And, as already mentioned, the car in fact went off the track towards the left. Therefore, upon this question, the case was properly submitted to the jury.

The motion for direction of a verdict seems to have been rested upon the additional ground that the alleged defect was so obvious that its existence must have been known to the plaintiff, and that he therefore assumed the risk. There was no direct evidence that he knew of the defect,

and it does not appear to have been a part of his duties to inspect the machine or the wheel, or to look after their condition. He had been employed for only three or four days in work that required him to ride upon the car, and at the utmost it was a question for the jury whether the defective condition of the wheel was so patent that he should be presumed to have known of it. And then, the question whether the defect was such as to render the use of the car dangerous was in dispute at the trial; hence, it could not be properly held that the risk was indisputably obvious, even to one who knew of the defect. It is quite clear, therefore, that a verdict could not properly have been directed in favor of the defendant upon the ground that the plaintiff, in using the car, had assumed an obvious risk.

There was a request for instructions to the effect that the plaintiff assumed the risk of injury from defects which he knew, or by the exercise of ordinary care in the discharge of his duties might have known, or which he had opportunity to know. These instructions the court refused to give, but charged the jury upon this question —"The true test is not in the exercise of ordinary care to discover dangers, by the employé, but whether the defect is known or plainly observable by him. An employé is not charged by law with the assumption of a risk arising out of defective appliances provided by his employer, unless his employment was of such a nature as to bring to his attention and cause him to realize and comprehend the dangers incident to the use of such appliances." This, we think, was a correct instruction under the circumstances of the case. An employé assumes the risk of dangers normally incident to the occupation in which he voluntarily engages, so far as these are not attributable to the employer's negligence. But the employé has a right to assume that his employer has exercised proper care with respect to providing a safe

place of work, and suitable and safe appliances for the work, and is not to be treated as assuming the risk arising from a defect that is attributable to the employer's negligence, until the employé becomes aware of such defect, or unless it is so plainly observable that he may be presumed to have known of it. Moreover, in order to charge an employé with the assumption of a risk attributable to a defect due to the employer's negligence, it must appear not only that he knew (or is presumed to have known) of the defect, but that he knew it endangered his safety; or else such danger must have been so obvious that an ordinarily prudent person under the circumstances would have appreciated it. *Union Pacific Railway Co.* v. *O'Brien*, 161 U. S. 451, 457; *Texas & Pacific Railway* v. *Archibald*, 170 U. S. 665, 671; *Choctaw, Oklahoma &c. R. R. Co.* v. *McDade*, 191 U. S. 64, 68; *Texas & Pacific Ry. Co.* v. *Swearingen*, 196 U. S. 51, 62; *Burns* v. *Delaware & Atlantic Telegraph Co.*, 70 N. J. Law, 745, 752.

The next error alleged is the refusal of the trial court to permit Ryan, the operator of the car, to testify to a remark made, concerning the condition of the wheel, on the day before the accident. Ryan had testified that he noticed the alleged defect at the time referred to; that he, and Hall, and one Regna, and somebody else, were present; that a conversation was had in which Regna made a remark with respect to the crack in the wheel; and that this remark was made in his natural tone of voice while Hall was less than twenty yards away and within hearing distance, and so that he could have heard it if he had been listening. It was not shown that Hall made any comment upon the car or the wheel, or made any answer to Regna's remark, or took any part in the conversation. Plaintiff's counsel objected to the admission of the conversation on the ground that it had not been established that Hall heard it, and this objection was sustained.

It is insisted that the conversation was admissible as

proving notice to Hall of the condition of the wheel; and so it was, provided it appeared that he heard it. Whether he did hear it, was of course a question of fact. Plaintiff in error contends that this should have been submitted to the jury, with an instruction that if they believed Hall heard the conversation they might take that into consideration in determining whether he knew the condition to the wheel and the effect of using it in that condition.

We agree that the testimony was such as to render it a matter of doubtful inference whether Hall heard the conversation; but we think this question of fact was one to be determined by the trial court, and not by the jury. Questions of the admissibility of evidence are for the determination of the court; and this is so whether its admission depend upon matter of law or upon matter of fact. And the finding of the trial judge upon such a preliminary question of fact is not subject to be reversed on appeal or error if it be fairly supported by the evidence, as it is in the case before us. *Bartlett* v. *Smith*, 11 M. & W. 483, 485; *Doe, dem. Jenkins* v. *Davies*, 10 Ad. & El., N. S. 314, 323; *Spring Co.* v. *Edgar*, 99 U. S. 645, 658; *Stillwell Mfg. Co.* v. *Phelps*, 130 U. S. 520, 527; *Inland & Seaboard Coasting Co.* v. *Tolson*, 139 U. S. 551, 559; *State* v. *Monich*, 74 N. J. Law, 522, 526; *State* v. *Tomassi*, 75 N. J. Law, 739, 743; *Gorton* v. *Hadsell*, 9 Cush. 508, 511. And see *Tayloe* v. *Riggs*, 1 Pet. 591, 597.

Finally, it is insisted that there was error in entering judgment in favor of the plaintiff for $5,000, after the residue of the verdict of $10,000 was remitted pending the motion for new trial. The argument is that the voluntary remission of so large an amount by the plaintiff was an admission that the verdict was excessive; that an excessive verdict may not be cured by a remitter where the amount of the damages cannot be measured by any fixed standard or determined with certainty; that a verdict so excessive

is conclusive evidence that it was the product of prejudice on the part of the jury, and that this vice goes to the entire verdict, and not merely to the excess. The practice, however, is recognized by the Civil Code (Ariz. Rev. Stat. 1901, pars. 1450 and 1451), which permit any party in whose favor a verdict or judgment has been rendered to remit any part thereof, after which execution shall issue for the balance only of such judgment. In *Northern Pacific R. R. Co.* v. *Herbert*, 116 U. S. 642, 646, an action in a territorial court to recover damages for personal injuries that necessitated the amputation of a leg, there was a verdict in favor of the plaintiff for $25,000, a motion for a new trial on various grounds, among others that the damages were excessive, and the court ordered that a new trial be granted unless plaintiff remitted $15,000 of the verdict, and, in case he did so, that the motion should be denied. He remitted the amount, and judgment was entered in his favor for the balance, which the Supreme Court of the Territory affirmed. This court held that the matter was within the discretion of the court; and this even without the sanction of a statute. The constitutional question involved was reëxamined in *Arkansas Cattle Co.* v. *Mann*, 130 U. S. 69, 73, and the decision in the *Herbert Case* was adhered to, it being held that the practice under criticism did not in any just sense impair the right of trial by jury.

In *Southern Pacific Co.* v. *Tomlinson*, 4 Arizona, 126, 132, and in *Southern Pacific Co.* v. *Fitchett*, 9 Arizona, 128, 134, the general practice was sustained by the territorial Supreme Court. In the former case, however, it was said (4 Arizona, 132) that "if it is apparent to the trial court that the verdict was the result of passion or prejudice, a *remittitur* should not be allowed, but the verdict should be set aside. In passing upon this question the court should not look alone to the amount of the damages awarded, but to the whole case." In the *Fitchett*

Case, it appearing that the trial court was of the opinion that more than half of the damages awarded for the appellee's injured feelings were excessive, the Supreme Court held that evidently the verdict was not the result of cool and dispassionate consideration, and that the question of the proper sum to be awarded ought not to have been determined by the trial court, but should have been submitted to the determination of another jury. In the present case (13 Arizona, 276) the majority of the court declared they were not prepared to adhere to the views expressed in the *Fitchett Case:* that while there is authority for the position that in no case of unliquidated damages should the court permit a remission where the verdict is excessive, without the consent of the defendant, the great weight of authority supports the practice; citing the decisions of this court already referred to; and declaring that while, if it appears that the verdict is tainted with prejudice or passion, and does not represent the dispassionate judgment of the jury upon the question of the right of the plaintiff to recover, a new trial should be granted, yet the trial court is in a better position to determine this than the appellate court, so that its determination should ordinarily be accepted. We see no ground for disturbing this decision.

Judgment affirmed.